

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

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4 In re:

5 Chapter 11
6 MPM SILICONES, LLC, et al., Case No. 14-22503-rdd
7 Debtors.

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9 B E F O R E:

10 HON. ROBERT D. DRAIN
11 U.S. BANKRUPTCY JUDGE
12

13 Corrected and Modified Bench Ruling on Confirmation of Debtors'
14 Joint Chapter Plan of Reorganization for Momentive Performance
15 Materials Inc. and its Affiliated Debtors.
16

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12
13 Good afternoon. We are back on the record in In re
14 MPM Silicones, LLC. I had adjourned my bench ruling on
15 confirmation of the debtors' chapter 11 plan and the related
16 rulings in the three adversary proceedings to give the parties
17 another day to see if they could negotiate, as between the
18 first and the 1.5 lien holders and the debtors and the second
19 lien holders' representatives, any settlement of their issues.
20 I gather, since you're all here and looking fairly stony faced,
21 that hasn't happened?

22 Okay. All right. So, I will give you my ruling on
23 confirmation.

24 I am going to give what will sound like a series of
25 bench rulings on five issues that remain open regarding
confirmation of the chapter 11 plan and, with respect to the
subordination of the senior subordinated unsecured notes, or
the extent of that subordination, and the extent of the so-

1 called make-whole provisions in the first and 1.5 lien
2 indentures, in the three related adversary proceedings covered
3 by my prior order on confirmation hearing procedures. The
4 context of each of these rulings, however, is my ruling on
5 confirmation of the debtors' chapter 11 plan, as it has been
6 modified on the record a couple of times during the
7 confirmation hearing.

8 I have reviewed all of the evidence submitted in
9 connection with the debtors' request for confirmation of the
10 plan, which includes not only the live trial record of the
11 four-day confirmation hearing held last week, but also the
12 declarations, exhibits, including expert reports, and
13 deposition testimony that was admitted into evidence during
14 that time. It's clear to me that, except for the issues that I
15 am about to rule on and the one other issue that I ruled on
16 last week, namely, the absolute priority rule objection to
17 confirmation of the plan raised by the subordinated
18 noteholders, which I decided in favor of the debtors, there are
19 no disputes as to the confirmation of the plan. And, having
20 reviewed the record, I am prepared to make the findings under
21 section 1129(a) of the Bankruptcy Code required for
22 confirmation, leaving aside, again, the five issues that I am
23 going to address this afternoon.

24 I clearly have jurisdiction with regard to those
25 issues, which arise under sections 510(a), 502(b)(2), 506(b),

1 1129(a) and (b) of the Bankruptcy Code, pursuant to 28 U.S.C.
2 sections 157(a)-(b) and 1334(b), as these issues arise under
3 the Bankruptcy Code and in the chapter 11 case, let alone that
4 they're clearly related to the chapter 11 case.

5 As I noted, two of the issues also arise in three
6 adversary proceedings, and at least one of the parties in those
7 proceedings has stated, as required under the Local Rules, its
8 view that the Court lacks the power to issue a final order or
9 final determination of the issues in that proceeding. Absent
10 the Supreme Court's ruling in *Stern v. Marshall*, 131 S. Ct.
11 2594 (2011), there would be no question that I have such power,
12 as these are all core matters under 28 U.S.C. section
13 157(b)(2), each pertaining to confirmation of the debtors' plan
14 and/or the treatment of the claims of the first lien holders,
15 1.5 lien holders, second lien holders and subordinated
16 noteholders.

17 I continue to have the power to issue a final order on
18 these issues on a Constitutional basis under *Stern v. Marshall*.
19 The issues all involve fundamental aspects of the adjustment of
20 the debtor/creditor relationship. Colloquially, they pertain
21 to how the pie of the bankruptcy estate will be divided among
22 the groups of claimants that I just listed, not whether the
23 estate will be augmented by a claim against a third party.
24 Moreover, the issues clearly pertain to rights unique to
25 bankruptcy law under section 1129(b) of the Bankruptcy Code and

1 sections 1129(a)(1) and 510(a) of the Code, as well as the
2 treatment of claims under sections 502(b)(2) and 506(b) of the
3 Code. Accordingly, under *Stern v. Marshall*, 131 S. Ct. 2618, I
4 have the power to issue a final order or determination on these
5 issues notwithstanding that this is an Article I, not an
6 Article III, court.

7 These rulings, as will ultimately be memorialized in
8 an order on confirmation as well as orders in respect of the
9 three adversary proceedings, in each case will be a final
10 determination by the Court.

11 Before I get to the rulings, I also want to note that
12 I am providing a bench ruling here in recognition of the need
13 for a prompt determination in this case of these issues, after
14 having established a complete record and thought about them, I
15 hope, thoroughly. These are ongoing businesses with thousands
16 of employees as well as hundreds if not thousands of creditors
17 and customers, and they deserve a prompt response. As I noted
18 yesterday, when I give a bench ruling, at times the ruling can
19 be lengthy with significant citation; and in those instances I
20 normally go over the transcript and reserve the right to
21 correct it not only as to inaccuracies by the court reporter,
22 but also as to content, whether I said something
23 ungrammatically, for example, or whether I wanted to say
24 something slightly differently. If I do edit the ruling on the
25 latter two grounds, I will separately file it as a modified

1 bench ruling. It won't be the transcript at that point; it
2 will instead be a modified bench ruling, although the holdings
3 on these issues won't change.

4

5 Let me turn to the first issue, which involves, as
6 noted, the extent of the subordination of the senior
7 subordinated unsecured notes. This issue comes up in Adversary
8 Proceeding No. 14-08238 under section 510(a) of the Bankruptcy
9 Code, which provides, "A subordination agreement is enforceable
10 in a case under this title to the same extent that such
11 agreement is enforceable under applicable nonbankruptcy law."
12 It is also integral to the Court's consideration of the
13 debtors' request for confirmation of the chapter 11 plan,
14 because the plan has a specific interpretation of the extent of
15 the subordination of the senior subordinated notes that the
16 subordinated noteholders disagree with and provides, based on
17 that interpretation, that there will be no distribution to the
18 senior subordinated noteholders in recognition of the debtors'
19 view, supported by the second lien holders, that their
20 subordination agreement requires that any distribution that
21 would otherwise go to them would have to be distributed instead
22 to the second lien holders in full.

23 It thus serves as a gate-keeping issue for
24 confirmation of the plan, because section 1129(a)(1) of the
25 Bankruptcy Code provides that, to be confirmed, the plan must

1 comply with the applicable provisions of the Code, which
2 include section 510(a).

3 The outcome hinges primarily if not entirely on
4 interpretation of the relevant agreement, the senior
5 subordinated unsecured note indenture, which, as all of the
6 parties recognize, is governed by New York law. They also
7 recognize that, when interpreting the indenture, the Court
8 should apply basic New York contract law. See *In re AMR Corp.*,
9 730 F.3d, 88, 98 (2d Cir. 2013), citing, among other cases,
10 *Sharon Steel Corp. v. Chase Manhattan Bank N.A.*, 691 F.2d 1039,
11 1049 (2d Cir. 1982).

12 Those basic contract interpretation principles are
13 well established. Under New York law, the best evidence, and,
14 if clear, the conclusive evidence, of the parties' intent, is
15 the plain meaning of the contract. Thus, in construing a
16 contract under New York law, the Court should look to its
17 language for a written agreement that is complete, clear, and
18 unambiguous on its face; and, if that is the case, it must be
19 enforced according to its plain terms. *J. D'Addario & Company*
20 *Inc. v. Embassy Industries, Inc.*, 20 N.Y.3d 113, 118 (2012);
21 *Greenfield v. Philles Records Inc.*, 98 N.Y.2d 562, 569 (2002).

22 A contract is ambiguous if its terms are "susceptible
23 to more than one reasonable interpretation." *Evans v. Famous*
24 *Music Corp.*, 1 N.Y.3d 452, 458 (2004); see also *British*
25 *International Insurance Co. v. Seguros La Republica, S.A.*, 342

1 F.3d 78, 82 (2d Cir. 2003), stating, "an ambiguity exists where
2 the terms of the contract could suggest more than one meaning
3 when viewed objectively by a reasonably intelligent person who
4 has examined the context of the entire integrated agreement and
5 who is cognizant of customs, practices, usages and terminology
6 as generally understood in the particular trade or business."

7 Thus, while in instances of ambiguity the Court may
8 look to parole evidence, if the agreement on its face is
9 reasonably susceptible to only one meaning, that meaning
10 governs; a court is not free to alter the contract to reflect
11 its personal notions of fairness and equity. *Greenfield v.*
12 *Philles Records Inc.*, 98 N.Y.2d at 569; see also *In re AMR*
13 *Corp.*, 730 F.3d at 98.

14 Some additional points are worth emphasizing before
15 proceeding to the language of the indenture itself. As noted
16 in several of the foregoing authorities, the context of the
17 entire agreement is important. The courts have cautioned
18 (including when construing subordination language) that one
19 should not take an isolated provision that might be susceptible
20 to one or more readings out of context, but should apply it
21 instead in the context of the entire agreement, or construe
22 it in a way that is plausible in the context of the entire
23 agreement. See, for example, *Barclays Capital, Inc. v.*
24 *Giddens*, 2014 U.S. App. LEXIS 15009, at *21 (2d Cir. Aug. 5,
25 2014); *In re Tribune Company*, 472 B.R. 223, 255 (Bankr. D. Del.

1 2012), aff'd in part, vacated in part on other grounds, 2014
2 U.S. Dist. LEXIS 82782 (D. Del. June 18, 2014).

3 It is also fundamental that every word of the
4 agreement should, to the extent possible, be given a meaning,
5 or, in other words, one of the most basic interpretive canons
6 is that a contract should be construed so that effect is given
7 to all of its provisions and no part will be inoperative or
8 superfluous or of no significance. See, for example, LaSalle
9 Bank N.A. v. Nomura Asset Capital Corp. 424 F.3d 195, 206 (2d
10 Cir. 2005); Lawyers' Fund for Client Protection v. Bank Leumi
11 Trust Co. of New York, 94 N.Y.2d 398, 404 (2000).

12 It is also relevant, at least to confirm what appears
13 to be an unambiguous provision or set of provisions in a
14 contract, to consider the parties' interpretation of the
15 contract in practice before litigation with respect to the
16 underlying issue. See, for example, In re Actrade Financial
17 Technologies, Ltd., 424 B.R. 59, 74 (Bankr. S.D.N.Y. 2009), and
18 In re Oneida, Ltd., 400 B.R. 384, 389 (Bankr. S.D.N.Y., 2009),
19 aff'd 2010 U.S. Dist. LEXIS 6500 (S.D.N.Y. January 22, 2010).

20 Finally, the Court may be assisted in its
21 understanding of the context of the contract by third party
22 commentaries, particularly by seemingly nonpartisan industry
23 groups like the ABA. See, for example, In re Metromedia Fiber
24 Network, Inc., 416 F.3d 136, 139-40 (2d Cir. 2005), as well as,
25 at least when a contract's meaning is being clarified in

1 context, Quadrant Structured Products Co., Ltd. v. Vertin, 2014
2 N.Y. LEXIS 1361, at *31-2 (N.Y. June 10, 2014).

3 Having laid out these basic contract interpretation
4 principles, let me turn to the language of the senior
5 subordinated unsecured note indenture itself, noting first that
6 both sides in this dispute have taken the position that these
7 terms, although their import is disputed, are, in fact,
8 unambiguous and susceptible to a plain meaning reading.

9 The operative paragraph providing for the
10 subordination of the senior subordinated unsecured notes is
11 Section 10.01 of the indenture, which provides in relevant
12 part, "The Company [meaning the issuer/debtor] agrees, and each
13 Holder, by accepting a Security agrees, that the Indebtedness
14 evidenced by the Securities, is subordinated in right of
15 payment, to the extent and in the manner provided in this
16 Article 10, to the prior payment in full of all existing and
17 future Senior Indebtedness of the Company and that the
18 subordination is for the benefit of and enforceable by the
19 holders of such Senior Indebtedness. The Securities shall in
20 all respects rank pari passu in right of payment with all the
21 existing and future Pari Passu Indebtedness of the Company and
22 shall rank senior in right of payment to all existing and
23 future Subordinated Indebtedness of the Company; and only
24 Indebtedness of the Company that is Senior Indebtedness of the
25 Company shall rank senior to the Securities in accordance with

1 the provisions set forth herein."

2 "Indebtedness" is defined in the indenture at page 19
3 as "(1) the principal and premium (if any) of any
4 indebtedness" -- lower case i -- "of such Person whether or not
5 contingent, (a) in respect of borrowed money, (b) evidenced by
6 bonds, notes debentures or similar instruments or letters of
7 credit or banker's acceptances (or, without duplication,
8 reimbursement agreements in respect thereof), (c) representing
9 the deferred or unpaid purchase price of any property," and
10 other types of debt not relevant hereto;

11 and then, in paragraph (2), "to the extent not
12 otherwise included, any obligation" -- lower case o -- "of such
13 Person to be liable for, or to pay, as obligor, guarantor or
14 otherwise, on the Indebtedness of another Person (other than by
15 endorsement of negotiable instruments for collection in the
16 ordinary course of business);

17 "(3) to the extent not otherwise included,
18 Indebtedness of another Person secured by a Lien" -- uppercase
19 L -- "on any asset owned by such Person (whether or not such
20 Indebtedness is assumed by such person); provided, however,
21 that the amount of such Indebtedness will be the lesser of: (a)
22 the Fair Market Value of such asset at such date of
23 determination, and (b) the amount of such Indebtedness of such
24 other Person;"

25 and then (4), another type of indebtedness that is not

1 relevant here; and there is a proviso that's also not relevant
2 here, with respect to contingent obligations as deferred or
3 prepaid revenues of purchase price holdbacks.

4 It is clear, therefore, from a plain reading of
5 Section 10.01 of the indenture and the definition of
6 "Indebtedness" that the indenture and, in particular, its
7 subordination provision, provides for debt or claim
8 subordination, not lien subordination.

9 There is a good example in the record of lien
10 subordination, which I will get to, in the form of the
11 Intercreditor Agreement among the second lien holders and the
12 senior lien holders, as well as the debtors. However, it is
13 clear from the subordination provision of Section 10.01 and the
14 definition of "Indebtedness" that I previously quoted that the
15 subordination of the senior subordinated unsecured notes is a
16 subordination in respect of the payment of debt, and that the
17 parties distinguished liens, which secure indebtedness, from
18 indebtedness itself in several instances in the indenture,
19 including in the definition of "Indebtedness" and "Lien," which
20 is found on page 21 of the indenture: "'Lien' means with
21 respect to any asset, any mortgage, lien, pledge, charge,
22 security interest or encumbrance of any kind in respect of such
23 asset, whether or not filed, recorded or otherwise perfected
24 under applicable law (including any conditional sale or other
25 title retention agreement, any lease in the nature thereof, any

1 option or other agreement to sell or give a security interest
2 in and any filing of or agreement to give any financing
3 statement under the Uniform Commercial Code (or equivalent
4 statutes) of any jurisdiction)."

5 Clearly, liens differ from indebtedness in common
6 parlance and as defined in the indenture. Liens have a life of
7 their own; they are not a characteristic of indebtedness but,
8 rather, secure it.

9 Under Section 10.01 of the indenture, the senior
10 subordinated noteholders have subordinated their right to
11 payment of the debt owed to them to the extent provided for in
12 the indenture to the prior payment in full of all existing and
13 future "Senior Indebtedness." The issue comes down to, then,
14 in large measure, the definition of "Senior Indebtedness" found
15 at page 32 of the indenture, which provides, "'Senior
16 Indebtedness' means all Indebtedness and any Receivables
17 Purchase Option of the Company or any Restricted Subsidiary,
18 including interest thereon (including interest accruing on or
19 after the filing of any petition in bankruptcy or for
20 reorganization relating to the Company or any Restricted
21 Subsidiary at the rate specified in the documentation with
22 respect thereto, whether or not a claim for post-filing
23 interest is allowed in such a proceeding) and other amounts
24 (including fees, expenses, reimbursement obligations under
25 letters of credit and indemnities) owing in respect thereof,

1 whether outstanding on the Issue Date or thereafter incurred,
2 unless the instrument creating or evidencing the same or
3 pursuant to which the same is outstanding expressly provides
4 that such obligations are subordinated in right of payment to
5 any other Indebtedness of the Company or such Restricted
6 Subsidiary, as applicable."

7 That last clause is the first proviso to "Senior
8 Indebtedness." That is, Senior Indebtedness means all
9 Indebtedness "unless the instrument creating or evidencing the
10 same or pursuant to which the same is outstanding expressly
11 provides that such obligations are subordinated in right of
12 payment to any other Indebtedness of the Company." In other
13 words, this first proviso states that indebtedness under the
14 senior subordinated unsecured notes will not be subordinated to
15 indebtedness under instruments that expressly provide that such
16 indebtedness is itself subordinated debt.

17 Next, the indenture's definition of "Senior
18 Indebtedness" sets forth a series of other exceptions or
19 provisos, stating, "provided, however, that Senior Indebtedness
20 shall not include, as applicable: (1) any obligation of the
21 Company to any Subsidiary of the Company other than any
22 Receivables Repurchase Obligation or any Subsidiary of the
23 Company to the Company or any other Subsidiary of the Company
24 [that is, intercompany debt is not Senior Indebtedness];

25 "(2) any liability for Federal, state, local, or other

1 taxes owed or owing by the Company or such Restricted
2 Subsidiary [that is, tax obligations are not Senior
3 Indebtedness];

4 "(3) any accounts payable or other liability to trade
5 creditors arising in the ordinary course of business (including
6 guarantees thereof or instruments evidencing such liabilities)"
7 [that is, trade debt is not Senior Indebtedness];

8 "(4) any Indebtedness or obligation of the Company or
9 any Restricted Subsidiary that by its terms is subordinate or
10 junior in any respect to any other Indebtedness or obligation
11 of the Company or such Restricted Subsidiary, as applicable,
12 including any Pari Passu Indebtedness;

13 "(5) Any obligations with respect to any Capital
14 Stock; or

15 "(6) any Indebtedness Incurred in violation of this
16 Indenture, but as to any such Indebtedness Incurred under the
17 Credit Agreement, no such violation shall be deemed to exist
18 for purposeless of this clause (6) if the holders of such
19 Indebtedness or their Representative shall have received an
20 Officer's Certificate to the effect that the Incurrence of such
21 Indebtedness does not (or, in the case of a Revolving Credit
22 Facility thereunder, the Incurrence of the entire committed
23 amount thereof at the date on which the initial borrowing
24 thereunder is made, would not) violate this Indenture."

25 The subordinated noteholders contend that clause (4)

1 of the definition of "Senior Indebtedness" which I have just
2 quoted provides that (notwithstanding clause 4's failure to
3 refer to liens) any indebtedness that would otherwise be Senior
4 Indebtedness would not have the benefit of the indenture's
5 subordination provision because of the fact that it is secured
6 by a junior lien

7 Again, clause (4) to this series of additional
8 provisos to the definition of "Senior Indebtedness" excludes
9 any "Indebtedness or obligation of the Company or any
10 Restricted Subsidiary that by its terms is subordinate or
11 junior in any respect to any other Indebtedness or obligation
12 of the Company or such Restricted Subsidiary, as applicable."

13 The subordinated noteholders contend (and it is
14 basically their only argument) that the foregoing "junior in
15 any respect" language would pick up, given the broad meaning of
16 "in any respect," liens that are junior to other liens, and
17 accordingly, indebtedness secured by such liens.

18 The debtors disagree, arguing that, when viewed
19 pursuant to the contract interpretation principles that I have
20 stated, clause (4) of this second group of provisos to the
21 definition of "Senior Indebtedness" pertains only to debt
22 subordination and not to lien subordination, consistent with
23 the distinction throughout the indenture between liens and
24 debt, on the one hand, and liens that secure such obligations,
25 on the other, starting with Section 10.01.

1 After reviewing the indenture and the commentaries and
2 other documents that were admitted into evidence in connection
3 with this dispute, I agree with the debtors' interpretation of
4 clause (4). I do so for a number of reasons, but primarily
5 because of the wording of the clause itself and the fundamental
6 contract interpretation principle that no material term of an
7 agreement should be superfluous under one party's construction
8 where it has a meaning under the other's, or, in other words,
9 that the contract should be read to give effect to all of its
10 provisions. See, again, LaSalle National Bank Association v.
11 Nomura Asset Capital Corp., 424 F.3d at 206; Lawyers' Fund for
12 Client Protection v. Bank Leumi Trust Co., 94 N.Y.3d at 404.

13 Under the definition of Senior Indebtedness that I've
14 quoted, the parties first excluded Indebtedness where "the
15 instrument creating or evidencing the same or pursuant to which
16 the same is outstanding expressly provides that such
17 obligations are subordinated in right of payment to any other
18 Indebtedness of the Company." Then, in clause (4) of the
19 definition, the parties further excluded "any Indebtedness or
20 obligation of the Company or a Restricted Subsidiary that by
21 its terms is subordinated or junior in any respect to any other
22 Indebtedness or obligation of the Company." The subordinated
23 noteholders' reading of clause (4) would swallow up the first
24 exclusion that I have quoted. That is, under their
25 interpretation, as long as any rights of a creditor are junior

1 to any other creditor's rights, such as in respect of a junior-
2 in-time or junior-by-agreement lien, the creditor's
3 indebtedness is not Senior Indebtedness entitled to the benefit
4 of section 10.01. This broad reading of the exclusion in
5 clause (4) would render the definition's first exclusion of
6 expressly contractually subordinated debt superfluous.

7 On the other hand, the debtors' interpretation of
8 clause (4), which is that it applies to obligations that are by
9 their terms subordinate even if not expressly so stated in the
10 instrument creating the obligation, permits both exceptions to
11 "Senior Indebtedness" to have a separate purpose. For example,
12 obligations made subordinate to other obligations in a separate
13 agreement, like an intercreditor agreement, or obligations that
14 do not expressly state that they are subordinate to other
15 obligations but are so by their terms, such as a "last out"
16 facility in which one tranche of debt is to be paid after the
17 rest of the debt under the same note, would fall within clause
18 (4)'s exception but not into the first, introductory exception
19 under the debtors' reading of the definition of Senior
20 Indebtedness.

21 The debtors' interpretation also tracks the plain
22 terms of clause (4), noting the difference between a debt and a
23 lien that secures a debt. Thus clause (4) excepts from the
24 definition of "Senior Indebtedness" any Indebtedness or
25 obligation of the Company or a Restricted Subsidiary that by

1 its terms is subordinate or junior in any respect to any other
2 Indebtedness or obligation." (Emphasis added.) The
3 highlighted word "its" refers to the terms of the Indebtedness
4 or the obligation -- which are separate from the terms of a
5 lien, mortgage, security interest, encumbrance, etc. - as being
6 junior to any other Indebtedness or obligation, not to the
7 terms of a lien being junior to any other lien.

8 The debtors also correctly point out that the
9 commentary to the ABA model subordinated unsecured note
10 indenture, appearing in Committee on Trust Indentures and
11 Indenture Trustees ABA Section of Business Law, "Model
12 Negotiated Covenants and Related Definitions," 61 Bus. Law.
13 1439 (Aug. 2006), states that the form of clause (4) should be
14 omitted if the obligor is "issuing junior subordinated
15 securities." Id. at 62. Again, that is, the emphasis is on
16 debt subordination, not lien subordination, junior subordinated
17 securities being debt that is subordinated in any way by its
18 terms to other debt. The commentary does not state that the
19 clause should alternatively be omitted if the subordinated debt
20 is intended to be pari passu with debt secured by a lien junior
21 to another lien granted by the issuer.

22 The debtors' reading is also consistent with the rest
23 of the indenture and the context of its subordination
24 provision. The rationale, according to the subordinated
25 noteholders, of an additional carve-out from Senior

1 Indebtedness for indebtedness secured by a junior lien is the
2 concern that junior lien financings could effectively overcome
3 or get around or fit into a loophole in contracts pursuant to
4 which one group of debt holders subordinate their debt to
5 another. The second lien indebtedness would be senior debt,
6 that is, layered ahead of the senior subordinated notes
7 although secured by only a junior lien that, based on the value
8 of the collateral, might be largely or entirely undersecured,
9 something that senior subordinated unsecured noteholders would
10 not necessarily want.

11 It does not appear, however, that there is any anti-
12 layering provision in this indenture responsive to that
13 underlying concern. To the contrary, there are covenants in
14 the indenture that deal with the incurrence of additional debt,
15 in section 4.03, the incurrence of additional liens, in section
16 4.12, and a limitation, in section 4.13, on senior or pari
17 passu subordinated indebtedness that permit both the issuance
18 of the second lien notes and, more importantly, permit them to
19 be senior to the subordinated notes regardless of whether they
20 were secured by a lien. Notwithstanding those specific
21 provisions, however, the subordinated noteholders have proposed
22 an interpretation of clause (4) in the definition of "Senior
23 Indebtedness" that would essentially override those provisions
24 and exclude the second lien notes from the benefit of Section
25 10.01 merely because they were secured.

1 Moreover, the commentary upon which the senior
2 subordinated noteholders base their argument that clause (4)
3 was intended to close a loophole presented by junior lien
4 financings points to the need, if one wants to exclude debt
5 secured by a junior lien from the benefit of a subordination
6 provision, to do so in an anti-layering covenant.

7 That is the case in the Fitch commentary, at page 275,
8 which is attached as Exhibit L to Mr. Kirpilani's declaration,
9 as well as the presentation to an American Bankruptcy Institute
10 panel from 2006 attached as Exhibit J to his declaration, at
11 pages 13-14. Indeed, the Thompson Reuters Legal Solutions
12 Practical Law excerpt attached as Exhibit H to Mr. Kirpilani's
13 declaration states at pages 4-5 that the better solution to
14 deal with the concern about not being subordinated to second
15 lien debt would be to place the exclusion in the anti-layering
16 covenant itself or to add a new anti-layering provision.

17 The senior subordinated noteholders point to Section
18 1.04 of the indenture, which is entitled "Rules of
19 Construction" and includes as one of the parties' rules of
20 construction, in clause (f), the following: "[U]nsecured
21 Indebtedness shall not be deemed to be subordinate or junior to
22 Secured Indebtedness [and thus excluded from the definition of
23 Senior Indebtedness] merely by virtue of its nature as
24 unsecured Indebtedness." They suggest that the absence of
25 another, similar provision in the indenture, which does appear

1 in the 2006 ABA's "Model Negotiated Covenants and Related
2 Definitions" discussion, 61 Bus. Law. at 71, providing that
3 "[S]ecured Indebtedness shall not be deemed to be subordinate
4 or junior to any other secured Indebtedness merely because it
5 has a junior priority with respect to the same collateral,"
6 establishes, under the principle of *expressio unius est exclusio*
7 *alterius*, that the parties meant to exclude debt secured by a
8 junior lien from the reach of the subordination provision.

9 However, I disagree with that interpretation. It seems
10 to me that, instead, given the clear resolution of the parties'
11 anti-layering rights, the plain meaning of the definition of
12 "Senior Indebtedness" and the principle evident throughout the
13 indenture that liens secure debt and are not themselves debt,
14 there would be no need in the "Rules of Construction" section
15 to have such a provision specifically include debt secured by a
16 junior lien as Senior Indebtedness, in contrast to the need to
17 add Section 1.04(f), which pertains to debt, not liens. In any
18 event, it is clear from the ABA commentary, which dates from
19 August 2006 -- just a few months before the issuance of the
20 senior subordinated unsecured notes -- and other presentations
21 attached to Mr. Kirpilani's declaration that issues pertaining
22 to the subordination of unsecured debt to debt secured by
23 junior liens were still evolving when the senior subordinated
24 unsecured notes were issued; there was no well established
25 standard form that might add a meaningful context to the

1 indenture's plain terms and internal consistency. Cf. Quadrant
2 Structured Products Co., Ltd. V. Vertin, 2014 N.Y. LEXIS 1361,
3 at *31-2 (relying, in addition to considerable precedent, on
4 model no-action clause produced by the Ad Hoc Committee for
5 Revisions of the 1983 Modified Simplified Indenture that
6 predated the indenture at issue by 10 years).

7 The subordinated noteholders' interpretation of
8 "Senior Indebtedness" also would lead, to the anomalous result
9 that their notes would be subordinated to senior unsecured debt
10 (in this case, as suggested above, including the second lien
11 debt, which, when issued, was unsecured because it had only a
12 springing lien), but would cease to be subordinated when that
13 lien sprung or when such debt was issued on a secured basis.
14 There is no logical reason for such a distinction,
15 notwithstanding the subordinated noteholders' attempt to find
16 one.

17 The subordinated noteholders next contend that, even
18 under the debtors' interpretation of "Senior Indebtedness," the
19 Intercreditor Agreement entered into among the debtors, the
20 second lien holders and the first lien and 1.5 lien holders,
21 among others, and attached as Exhibit C to Mr. Kirpilani's
22 declaration, goes beyond lien subordination (which I have found
23 does not fit within the exception to "Senior Indebtedness"),
24 providing, in essence, for the subordination of the second lien
25 holders' debt to the debt secured by the liens of the first and

1 1.5 lien holders and any other debt that might be secured by
2 senior liens.

3 The Intercreditor Agreement clearly does restrict the
4 rights of the second lien holders, two of those restrictions
5 having been highlighted by the subordinated noteholders. First,
6 it provides that the second lien holders' right to the shared
7 collateral is subordinate to the senior lien holders' right to
8 such collateral, even if it turns out that the liens securing
9 the senior lien debt are not perfected or enforceable. Second,
10 it provides in paragraph 4.04 that the second lien holders
11 shall turn over to the senior lien holders any recoveries that
12 they obtain not only on account of their contractual liens on
13 the shared collateral, but also on account of judicial liens
14 that they may obtain.

15 However, contrary to the interpretation offered by the
16 subordinated noteholders that these provisions of the
17 Intercreditor Agreement are debt subordination provisions, they
18 pertain to lien subordination, governing rights in respect of
19 the shared collateral. Intercreditor agreements of this nature
20 that pertain to secured creditors' lien rights are commonly
21 geared to those rights whether or not the liens are perfected.
22 The parties are certainly free to, and do, agree that their
23 contractual liens, which they have mutually verified, are
24 effective as among each other, even if such liens later prove
25 to be generally ineffective because of a debtor's lien

1 avoidance powers. The focus still is on the collateral that
2 was agreed to be secured by the liens. See *In re Ion Media*
3 *Newworks, Inc.*, 419 B.R. 585, 594-95 (Bankr. S.D.N.Y. 2009)
4 ("By virtue of the Intercreditor Agreement, the parties have
5 allocated among themselves the economic value of the FCC
6 licenses as 'Collateral' (regardless of the actual validity of
7 liens in these licenses.)").

8 Similarly, it is typical of intercreditor agreements
9 among secured parties that rights to enforce interests in the
10 collateral are, as they are here, thoroughly addressed.
11 Accordingly, a provision stating that collections on a judicial
12 lien (as well as from enforcement of the second lien holders'
13 contractual lien) shall be turned over to the senior lien
14 holders are common in shared collateral agreements, given that
15 control over the collateral is a fundamental aspect of such
16 agreements. See, for example the American Bankruptcy Institute
17 presentation attached as Exhibit I to Mr. Kirpilani's
18 declaration, at page 25, listing intercreditor agreement
19 provisions that promote "first lienholders' desire to 'drive
20 the bus' in respect to remedies against the shared collateral."

21 In contrast, Section 5.04 of the Intercreditor
22 Agreement provides that nothing in that agreement alters the
23 second lien holders' rights in their capacity as unsecured
24 creditors, again highlighting the distinction between lien
25 subordination and debt subordination.

1 While there is no interpretive language
2 contemporaneous with the parties' entry into the senior
3 subordinated unsecured note indenture, the parties' subsequent
4 actions further support the debtors' reading of the
5 subordination provision's reach. For example, a substantial
6 portion of the subordinated notes, roughly \$118 million in face
7 amount, was exchanged in 2009 at a discount of at least 60
8 percent for second lien notes, which is inconsistent with the
9 subordinated noteholders' present argument that those notes are
10 pari passu.

11 In addition, the trustees for the senior subordinated
12 notes took no action with respect to the issuance of the second
13 lien debt or the springing of the lien securing it, although
14 arguably under the subordinated noteholders' current
15 interpretation the debtors' disclosures with respect to the
16 second lien notes -- that they were senior in right of payment
17 to the subordinated notes -- was inaccurate. It is clear from
18 the exhibits to the responses by the ad hoc committee of second
19 lien holders and Apollo, as well as the debtors' submissions,
20 that such disclosure was clear in the company's 8-K, 10-Ks, and
21 prospectuses.

22 It is also the case that, under the subordinated
23 noteholders' broad interpretation of clause 4's exception to
24 "Senior Indebtedness," the debt under the debtors' current
25 first and 1.5 lien notes also would not benefit from Section

1 10.01's subordination provision, notwithstanding that the
2 indenture's definition of "Designated Senior Indebtedness"
3 would include the first and 1.5 lien notes. In other words, the
4 definition of "Designated Senior Indebtedness" is not
5 integrated into the definition of "Senior Indebtedness" as
6 proposed by the subordinated noteholders, again rendering their
7 broad interpretation of clause 4's exception to such definition
8 highly unlikely in the context of the entire indenture.

9 The debtors, the ad hoc committee of second lien
10 holders, and Apollo in its capacity as a second lien holder
11 have also argued, in their briefs at least, that the
12 subordinated noteholders are estopped by laches or other
13 equitable principles from making the arguments that they are
14 making now, given their silence in the face of the issuance of
15 over a billion dollars of second lien debt that was widely
16 disclosed to be senior in right of payment to the senior
17 subordinated unsecured notes. At oral argument, the debtors
18 and the second lien holders seem to have walked back on that
19 argument, however, and I believe that it would not apply here
20 under the case law, in any event, in light of the need to
21 establish conduct upon which reliance is based and the absence
22 of a factual record to show such reliance. See, for example,
23 *River Seafoods, Inc. v. J.P. Morgan Chase Bank*, 796 N.Y.S.2d
24 71, 74 (1st Dept. 2005) (stating elements of equitable estoppel
25 under New York law), and *Eppendorf-Netheler-Hinz GMBH v.*

1 National Scientific Supply Company Inc., 14 Fed. Appx. 102, 105
2 (2d Cir. July 13, 2001) (stating elements of laches under New
3 York law).

4 But, based on the plain meaning of Section 10.01 and
5 the definition of "Senior Indebtedness," and, secondarily, the
6 distinction throughout the indenture, as well as when the
7 relevant provisions are read context, between lien rights and
8 the subordination of debt, I conclude that the second lien
9 holders' notes are "Senior Indebtedness" and, therefore,
10 entitled to the benefit of the subordination provision of
11 Section 10.01 of the indenture.

12

13 The next two issues pertain to a different set of
14 agreements that are subject to the same rules of contract
15 interpretation that I've previously summarized and won't
16 repeat, as both operative sets of agreements -- indentures and
17 notes -- are governed by New York law. The two issues involve
18 the rights of the indenture trustees, and therefore the
19 holders, of the first and 1.5 lien holders to a so-called
20 contractual "make-whole" claim, or, barring such a claim, a
21 common law claim for damages, based on the debtors' payment of
22 their notes before the original stated maturity of the notes.
23 The first and 1.5 lien holders' rights to such a claim are in
24 the first instance governed by the respective indentures and
25 notes, which, as relevant, contain the same provisions.

1 If, in fact, the trustees are entitled to such a claim
2 that is enforceable in bankruptcy, it will increase the amount
3 of the replacement notes to be issued to the first and 1.5 lien
4 holders as their distribution under the debtors' chapter 11
5 plan. That is, the plan leaves open, now that the classes of
6 first and 1.5 lien holders have rejected the plan, for the
7 Court to decide whether the first and 1.5 lien holders' allowed
8 claim includes a make-whole amount, whereas, if those classes
9 had accepted the plan they would have received a cash
10 distribution in the amount of their allowed claims specifically
11 without any make-whole amount.

12 The indentures for both sets of notes provide in
13 Section 3.01, captioned "Redemption," that "the Notes may be
14 redeemed, in whole, or from time to time in part, subject to
15 the conditions and at the redemption prices set forth in
16 paragraph 5 of the form of Notes set forth in Exhibit A and
17 Exhibit B hereto, which are hereby incorporated by reference
18 and made a part of this Indenture, together with accrued and
19 unpaid interest to the redemption date."

20 Section 3.02 of each indenture states, "Applicability
21 of Article. Redemption of Notes at the election of the Issuer
22 or otherwise, as permitted or required by any provision of this
23 Indenture, shall be made in accordance with such provision and
24 this Article."

25 Section 3.03 sets forth the procedure pursuant to

1 which the issuer, that is the debtors, "shall elect to redeem
2 Notes pursuant to the optional redemption provisions of
3 paragraph 5 of the applicable Note."

4 Section 3.06 of the indentures, entitled "Effect of
5 Notice of Redemption," states, "Once notice of redemption is
6 delivered in accordance with Section 3.05, Notes called for
7 redemption become due and payable on the redemption date and at
8 the redemption price stated in the notice, except as provided
9 in the final sentence of paragraph 5 of the Notes."

10 Section 3.09 of each indenture, in contrast to the
11 optional or elective redemption under sections 3.01 and 3.03 of
12 the indentures and paragraph 5 of the notes, provides for a
13 special mandatory redemption on the terms set forth in Section
14 3.09.

15 Paragraph 5 of the form of first and 1.5 lien notes
16 states, "Optional Redemption. Except as set forth in the
17 following two paragraphs, the Notes shall not be redeemable at
18 the option of MPM prior to October 15, 2005. Thereafter, the
19 Notes shall be redeemable at the option of MPM, in whole at any
20 time or in part from time to time" as provided therein. And
21 then it states, "In addition, prior to October 15, 2015, the
22 Issuer may redeem the Notes at its option, in whole at any time
23 or in part from time to time, upon not less than 30 nor more
24 than 60 days' prior notice delivered electronically or mailed
25 by first-class mail to each holder's registered address, at a

1 redemption price equal to 100% of the principal amount of the
2 Notes redeemed plus the Applicable Premium as of, and accrued
3 and unpaid interest and Additional Interest, if any, to, the
4 applicable redemption date (subject to the right of the Holders
5 of record on the relevant record date to receive interest due
6 on the relevant interest payment date)."

7 "Applicable Premium" is separately defined in the
8 indentures as follows: "With respect to any Note on any
9 applicable redemption date, the greater of: (1) 1% of the then
10 outstanding principal amount of such Note and (2) the excess
11 of: (a) the present value at such redemption date of (i) the
12 redemption price of such Note, at October 15, 2015 (such
13 redemption price being set forth in paragraph 5 of the
14 applicable Note) plus (ii) all required interest payments due
15 on such Note through October 15, 2015 (excluding accrued but
16 unpaid interest), computed using a discount rate equal to the
17 Treasury Rate as of such redemption date plus 50 basis points;
18 over (b) the then outstanding principal amount of such Note."

19 The indenture trustees for the first and 1.5 lien
20 notes argue that the chapter 11 plan's payment of the holders
21 with replacement notes entitles them to the Applicable Premium,
22 as they will receive such notes before October 15, 2015. They
23 contend that such payment would be an optional or elective
24 redemption under the provisions of the indentures and notes
25 that I have just read.

1 As I've noted and will discuss later, the trustees for
2 the first and 1.5 lien notes also argue that, even if they are
3 not entitled by contract to an Applicable Premium constituting
4 a make-whole under these circumstances, they nevertheless have
5 a claim under otherwise applicable law or the first sentence of
6 paragraph 5 of the notes, which they contend is a "non-call"
7 covenant, that is triggered by the debtors' early payment of
8 their notes in the form of replacement notes under the plan,
9 although the amount of such claim, or formula therefor, is not
10 set forth in the indentures or the notes.

11 Let me address the Applicable Premium argument first.
12 It is well established that when considering the allowance of a
13 claim in a bankruptcy case the court first considers whether
14 the claim would be valid under applicable nonbankruptcy law,
15 and then, second, if the claim is valid under applicable
16 nonbankruptcy law, whether there is any limitation on or
17 provision for disallowance of the claim under the Bankruptcy
18 Code. See *Ogle v. Fidelity & Deposit Company of Maryland*, 586
19 F.3d 143, 147-48 (2d Cir. 2009); *HSBC Bank U.S.A. v. Calpine*
20 *Corp.*, 2010 U.S. Dist. LEXIS 96792, at *18 (S.D.N.Y. Sept. 15,
21 2010).

22 It is well settled under New York law, which is,
23 again, the law governing these agreements, that the parties to
24 a loan agreement, indenture or note can amend the general rule
25 under New York law of "perfect tender" to provide for a

1 specific right on behalf of the borrower or issuer to prepay
2 the debt in return for agreed consideration that compensates
3 the lender for the cessation of the stream of interest payments
4 running to the original maturity date of the loan. Without
5 that contractual option, under the New York rule of perfect
6 tender the borrower/issuer would be precluded from paying the
7 debt early. See U.S. Bank National Association v. South Side
8 House LLC, 2012 Dist. LEXIS 10824, at *12-13 (E.D.N.Y. January
9 30, 2012), as well as Northwestern Mutual Life Insurance
10 Company v. Uniondale Realty Associates, 816 N.Y.S.2d 831, 835,
11 11 Misc. 3d 988, 984 (N.Y. Sup. Ct. 2006). See generally
12 Charles & Kleinhaus, "Prepayment Clauses in Bankruptcy," 15 Am.
13 Bankr. Inst. L. Rev. 537, 541 (Winter 2007) ("Charles &
14 Kleinhaus"), and the cases cited therein at 541 n.13, applying
15 New York's perfect tender rule.

16 It is also well-settled law in New York that a lender
17 forfeits the right to such consideration for early payment if
18 the lender accelerates the balance of the loan. The rationale
19 for this rule is logical and clear: by accelerating the debt,
20 the lender advances the maturity of the loan and any subsequent
21 payment by definition cannot be a prepayment. In other words,
22 rather than being compensated under the contract for the
23 frustration of its desire to be paid interest over the life of
24 the loan, the lender has, by accelerating, instead chosen to be
25 paid early. See U.S. Bank National Association v. South Side

1 House, 2012 U.S. Dist. LEXIS 10824, at *13-14, and the cases
2 cited therein, including In re LHD Realty Corp., 726 F.2d 327,
3 331 (7th Cir. 1984); In re Solutia, Inc., 379 B.R. 473, 487-88
4 (Bankr. S.D.N.Y. 2007); In re Granite Broadcasting Corp., 369
5 B.R. 120, 144 (Bankr. S.D.N.Y. 2007); and Northwestern Mutual
6 Life Insurance Company v. Uniondale Realty Associates, 816
7 N.Y.S.2d at 836.

8 There are two well-recognized exceptions to that
9 proposition. The first is agreed not to apply here, namely
10 when the debtor intentionally defaults in order to trigger
11 acceleration and evade the prepayment premium or make-whole,
12 the debtor will remain liable for the make-whole
13 notwithstanding acceleration of the debt. See Sharon Steel
14 Corp. v. The Chase Manhattan Bank. N.A., 691 F.2d 1039, 1053
15 (2d Cir. 1982). Here, even if the trustees had not conceded
16 this point, it is clear that the debtors' bankruptcy is not
17 simply a tactical device to deprive the first and 1.5 lien
18 holders of a make-whole claim.

19 The second exception, which is at issue here, is when
20 a clear and unambiguous clause calls for the payment of a
21 prepayment premium or make-whole even in the event of
22 acceleration of, or the establishment of a new maturity date
23 for, the debt. See, again, U.S. Bank National Association v.
24 South Side House, 2012 U.S. Dist. LEXIS 10824, at *14-16 and
25 *23; Northwestern Mutual Life Insurance Company v. Uniondale

1 Realty Associates, 816 N.Y.S.2d at 836, and the cases cited
2 therein. Thus, the first and 1.5 lien holders' right to an
3 Applicable Premium, or make-whole, hinges on whether the
4 relevant sections of their indentures and notes provide with
5 sufficient clarity for the payment of such premium after the
6 maturity of the notes has been accelerated.

7 Critically important, therefore, is another provision
8 of the indentures, Section 6.02, which provides generally that
9 the trustee or the holders of at least 25 percent of principal
10 amount of the outstanding notes, upon an event of default, can
11 elect to accelerate the notes, but also states, "If an Event of
12 Default specified in Section 6.01(f) or (g) with respect to MPM
13 [which includes the debtors' bankruptcy] occurs, the principal
14 of, premium, if any, and interest on all the Notes shall ipso
15 facto become and be immediately due and payable without any
16 declaration or other act on the part of the Trustee or any
17 Holders."

18 The form of note attached to the indentures also
19 provides, in paragraph 15, "If an Event of Default relating to
20 certain events of bankruptcy, insolvency or reorganization of
21 the Issuer occurs, the principal of, premium, if any, and
22 interest on all the Notes shall become immediately due and
23 payable without any declaration or other act on the part of the
24 Trustee or any Holders."

25 (Section 6.02 in the indentures also provides, in its

1 final sentence, "The Holders of a majority in principal amount
2 of outstanding Notes by notice to the Trustee may rescind any
3 such acceleration with respect to the Notes and its
4 consequences," and the last sentence of paragraph 15 of the
5 notes states, "Under certain circumstances, the Holders of a
6 majority in principal amount of the outstanding Notes may
7 rescind any such acceleration with respect to the Notes and its
8 consequences." The first and 1.5 lien trustees' arguments to
9 rescind acceleration of the notes are discussed in the third
10 section of this ruling)

11 In light of the automatic acceleration of the notes
12 under Section 6.02 of the Indentures, as also obliquely
13 referenced in paragraph 15 of the notes, upon the debtors'
14 bankruptcy filing, the debtors and the second lien holders
15 contend that the maturity date of the notes has been
16 contractually advanced and, thus, under New York law the first
17 and 1.5 lien holders, having provided for acceleration in the
18 applicable agreements, bargained for prepayment of the notes
19 upon the event of the debtors' bankruptcy and therefore
20 forfeited their right to the Applicable Premium.

21 (In addition, the debtors and the second lien holders
22 contend that the debtors' payment of the first and 1.5 lien
23 holders as required by the Bankruptcy Code before the original
24 maturity of the notes (or at least before October 15, 2015) is
25 not elective or voluntary, and, therefore, again, does not

1 subject the debtors to the Applicable Premium owed upon an
2 elective redemption under the express terms of Sections 3.02-
3 3.03 of the indentures and paragraph 5 of the notes. The
4 debtors have the option under section 1124 of the Bankruptcy
5 Code, however, to reinstate the first and 1.5 lien notes rather
6 than pay them with substitute consideration, under a chapter 11
7 plan. In addition, the notice requirements of Bankruptcy Rule
8 2002 arguably functionally track the election/notice process
9 provided in sections 3.03 and 3.05 of the indentures. Thus, I
10 have not further considered this argument of the debtors and
11 second lien holders in light of the efficacy of their first
12 argument.)

13 As noted previously, it is "well-settled law," South
14 Side House, 2012 U.S. Dist. LEXIS 10824, at *12, that, unless
15 the parties have clearly and specifically provided for payment
16 of a make-whole (in this case the Applicable Premium),
17 notwithstanding the acceleration or advancement of the original
18 maturity date of the notes, a make-whole will not be owed.
19 Such language is lacking in the relevant sections of the first
20 and 1.5 lien indentures and notes; therefore, they do not
21 create a claim for Applicable Premium following the automatic
22 acceleration of the debt pursuant to Section 6.02 of the
23 indentures. In addition to the cases that I have already cited
24 for this proposition, see *In re Madison 92nd Street Associates,*
25 LLC, 472 B.R. 189, 195-96 (Bankr. S.D.N.Y. 2012); *In re*

1 LaGuardia Associates LLP, 2012 Bankr. LEXIS 5612, at *11-13
2 (Bankr. E.D. Pa. Dec. 5, 2012); In re Premiere Entertainment
3 Biloxi, LLC, 445 B.R. 582, 627-28 (Bankr. S.D. Miss. 2010), and
4 the cases cited therein, all of which interpret New York law,
5 and some of which involve automatic acceleration clauses,
6 which, as noted by the district court in South Side House, have
7 the same negating effect as the voluntary exercise of an
8 acceleration right, given that such clauses were negotiated by
9 the parties. 2012 U.S. Dist. LEXIS 10824, at *20-23. See also
10 In re AMR Corporation, 730 F.3d at 101, in which the Second
11 Circuit made clear that such an automatic acceleration
12 provision operates by the choice of the indenture trustee as
13 much as the issuer/debtor; that is, such contractual automatic
14 acceleration is not voluntary on the issuer's part because it
15 is an enforceable covenant, including not being subject to
16 invalidation under any section of the Bankruptcy Code, such as
17 section 365(e), which would negate so-called ipso facto
18 provisions triggered by a debtor's bankruptcy filing.

19 The trustees for the first and 1.5 lien holders try
20 to get around the problem that their documents do not contain
21 sufficient language triggering an Applicable Premium after
22 acceleration in a couple of ways, one of which is to refer to a
23 discussion in In re Chemtura Corporation, 439 B.R. 561, 596-02
24 (Bankr. S.D.N.Y. 2010), in which Judge Gerber evaluated the
25 settlement of a make-whole dispute that was opposed by those

1 who contended that the beneficiaries of the settlement, who
2 were receiving a range of 39 and 43 percent of their make-whole
3 claim under it, should really recover nothing or at least far
4 less than that amount on account of such claims.

5 The trustees contend that Judge Gerber concluded that
6 a covenant triggering a make-whole amount upon a prepayment by
7 a date certain would be a specific enough of a reference to the
8 make-whole's being owed, notwithstanding the acceleration of
9 the debt, to satisfy the explicitness requirement in the cases
10 that I have previously cited.

11 I should note, however, that, in addition to the
12 settlement context in which Judge Gerber gave his analysis,
13 where he considered only whether the settlement lay within the
14 lowest bounds of reasonableness, he was focusing in Chemtura
15 not on a specific date like the pre-October 15, 2015 date set
16 forth in paragraph 5 of the notes here, but, rather, on a
17 provision that was triggered off a differently defined maturity
18 date than the original maturity date, thus keying liability for
19 the make-whole back to the need, as stated in the cases that I
20 have cited, to state clearly that the premium would be owed
21 notwithstanding the acceleration of the original maturity date.
22 Id. at 601

23 That is not the case under the notes and the
24 indentures here. Indeed, in each of the reported cases that
25 quote language that would be explicit enough to overcome the

1 waiver of the make-whole upon acceleration under New York law,
2 more was required than is contained in the relevant sections of
3 the indentures and notes that I have quoted -- either an
4 explicit recognition that the make-whole would be payable
5 notwithstanding the acceleration of the loan or, as stated by
6 Charles & Kleinhaus, a provision that requires the borrower to
7 pay a make-whole whenever debt is repaid prior to its original
8 maturity, which is in essence what Judge Gerber was referring
9 to in the Chemtura case. See Charles & Kleinhaus, 15 Am.
10 Bankr. Inst. L. Rev. at 556. See also, for examples of the
11 type of specificity required to satisfy applicable New York
12 law, the discussion in U.S. Bank National Association v. South
13 Side House, LLC, 2012 U.S. Dist. LEXIS, 10824, at *21-24, and
14 In re LaGuardia Associates, L.P., 2012 Bankr. LEXIS 5612, at
15 *14-16.

16 That type of specificity works notwithstanding the
17 purpose of a make-whole, which is to ensure that the lender is
18 compensated for being paid earlier than the original maturity
19 of the loan for the interest it will not receive, because make-
20 wholes are properly viewed as an option pursuant to which the
21 parties have allocated the cost of prepayment between
22 themselves. South Side House, 2012 U.S. Dist. LEXIS 10824, at
23 *22-23; Northwestern Mutual Life Insurance Company v. Uniondale
24 Realty Associates, 816 N.Y.S.2d at 984; Charles & Kleinhaus, 15
25 Am. Bankr. Inst. L. Rev. at 566-67. However, the option, as

1 noted, must be specific if the parties want it to apply even
2 after acceleration of the debt.

3 The trustees for the first and 1.5 lien notes also
4 contend that, even if they are not entitled to an Applicable
5 Premium, other provisions of the indentures refer to a lower
6 case "prepayment premium." For example, as I noted, Section
7 3.02 of the indentures refers to the "Redemption of Notes at
8 the election of the Issuer or otherwise as permitted or
9 required by any provision of this Indenture shall be made in
10 accordance with such provision in this Article." (Emphasis
11 added.) (Although it should be noted that Section 3.09 of the
12 indentures provides for a mandatory redemption, which is what
13 the "or otherwise" reference in Section 3.02 apparently
14 addresses.) In addition, they point out that Section 6.02 of
15 the indentures provides for the automatic acceleration upon the
16 debtors' bankruptcy of "the principal of, premium, if any, and
17 interest on all the Notes" (emphasis added), and Section 6.03
18 states that "If an Event of Default occurs and is continuing,
19 subject to the terms of the New Intercreditor Agreement or the
20 Junior Priority Intercreditor Agreements, the Trustee may
21 pursue any available remedy at law or equity to collect the
22 payment of principal of or interest on the Notes or to enforce
23 the performance of any provision of the Notes, this Indenture
24 or the Security Documents" (that is, acknowledging the
25 trustees' common law enforcement rights, which, the trustees,

1 contend, would include the payment of a prepayment premium).

2 Each of these references to other rights or "premiums,
3 if any," to be paid upon prepayment are not specific enough,
4 however, to overcome the requirement of New York law that I
5 have previously outlined in order for a make-whole or
6 prepayment claim to be payable post-acceleration.

7 Moreover, the "if any" language that I've quoted
8 refers back to the actual provisions of the indentures and
9 notes, the only one of which that specifically provides for an
10 optional redemption and payment of a specific premium (the
11 Applicable Premium) does not sufficiently provide for payment
12 after acceleration under New York law, as previously discussed.
13 A similar provision appeared in the instrument at issue in In
14 re LaGuardia Associates, L.P., 2012 Bankr. LEXIS 5612, and
15 Judge Raslavich construed it much as I have here, stating, "On
16 the contrary, [such provision] references 'any payment required
17 to be paid under the note.' That returns the inquiry back to
18 Section 1.02(b) of the note and its description of the specific
19 two events which have not occurred." Id. at *19-20. Similarly,
20 Section 3.02 of the indentures, which states, "Redemption of
21 Notes at the election of the Issuer or otherwise, as permitted
22 or required by any provision of this Indenture, shall be made
23 in accordance with such provision and this Article," does not
24 create a separate make-whole right enforceable upon
25 acceleration of the debt but only refers to rights that may be

1 triggered in accordance with the specific provisions of Article
2 3.

3 It is also the case that Section 3.06 of the
4 indentures, which states that "Once notice of redemption is
5 delivered in accordance with Section 3.05, Notes called for
6 redemption become due and payable on the redemption date and at
7 the redemption price stated in the notice, except as provided
8 in the final sentence of paragraph 5 of the Notes," is
9 superseded by the automatic acceleration upon the issuer's
10 bankruptcy, provided for in Section 6.02. That is, the
11 foregoing language from the Section 3.06 is not a substitute
12 for acceleration, which made the notes due and payable on the
13 bankruptcy petition date, or a clear enough statement that,
14 notwithstanding acceleration, the redemption date, that is, the
15 date upon which the issuer would call the notes for redemption,
16 would artificially jump ahead of the prior acceleration or
17 ignore the acceleration and entitle the holders to a make-whole
18 under New York law.

19 Therefore, the indentures and notes do not overcome or
20 satisfy the requirement under New York law that a make-whole be
21 payable specifically notwithstanding acceleration or payment
22 prior to the original maturity date under the terms of the
23 parties' agreements. There is, therefore, no claim for
24 Applicable Premium or any other amount under the indentures and
25 notes for the first and 1.5 lien holders that would be

1 triggered by the lien holders' treatment under the debtors'
2 chapter 11 plan, or any other payment of their notes following
3 their automatic acceleration under Section 6.02 of the
4 indenture.

5 This leaves to be decided the first and 1.5 lien
6 holders' remaining claim based on payment, under the chapter 11
7 plan by new replacement notes, of the first and 1.5 notes prior
8 to their maturity that would arise, they contend, under New
9 York's common law rule of perfect tender or, as argued by the
10 trustees, under the first sentence of paragraph 5 of the notes.
11 That sentence, they contend, sets forth a "non-call" covenant
12 when it states, "Except as set forth in the following two
13 paragraphs [which reference payments of contractual make-whole
14 that I have just ruled are not here owing], the Note shall not
15 be redeemable at the option of MPM prior to October 15, 2015."

16 The debtors and the second lien holders argue that
17 this sentence is no more than an introduction or framing device
18 for the notes' elective redemption provisions in return for
19 payment of the Applicable Premium, which immediately follow the
20 "non-call" sentence, and is not a specific contractual non-call
21 provision. In support of this contention, they point out that
22 the make-whole right actually arises under Sections 3.01-3.03
23 of the indentures, which then reference paragraph 5 of the
24 notes, which states the right to a make-whole amount under
25 certain circumstances. They are right: the indentures and notes

1 do not contain a covenant stating the amount owing upon the
2 voluntary call of the notes with the exception of sections
3 3.01-3.03 and the definition of Applicable Premium.

4 This leaves the trustees with the argument that New
5 York's common law of perfect tender would apply even if their
6 agreements were silent regarding the consequences of such
7 prepayment. That is, the trustees for the first and 1.5 lien
8 notes contend that the holders are entitled to a claim under
9 New York law for a prepayment premium based merely on the fact
10 of prepayment, which, they point out, would be preserved under
11 the general reservation of common law rights and remedies set
12 forth in Section 6.03 of the indentures.

13 As noted previously, New York law would, in fact,
14 provide for such a claim for breach of the rule of perfect
15 tender, at least one for specific performance. However,
16 applying the two-step claim analysis required by *Ogle v.*
17 *Fidelity & Deposit Company of Maryland*, 586 F.3d at 147-48, the
18 trustees would not have an allowable claim for such damages
19 under the Bankruptcy Code, because this is one of the few
20 instances when specific provisions of the Bankruptcy Code
21 disallow such a claim -- section 506(b), as well as section
22 502(b)(2), which disallows claims for unmatured interest.

23 First, it is well recognized that, notwithstanding New
24 York's perfect tender rule, such right is not enforceable by
25 specific performance in a bankruptcy case, given the Bankruptcy

1 Code's non-contractual acceleration of debt for claim
2 determination purposes. See, for example, HSBC Bank USA v.
3 Calpine Corp., 2010 U.S. Dist. LEXIS 96792, at *11-14, and
4 Charles & Kleinhaus, 15 Am. Bankr. Inst. L. Rev. at 563-64.

5 In addition, as noted, no provision of the indentures
6 and notes (except as already found to be inapplicable in light
7 of the acceleration of the debt) provides for an additional
8 premium to be paid upon the prepayment of the notes. Thus, the
9 claim would not fall under the allowed claim provided to
10 oversecured creditors for fees and charges under the parties'
11 agreement under section 506(b) of the Bankruptcy Code up to the
12 value of their collateral. See HSBC Bank USA v. Calpine Corp.,
13 2010 U.S. Dist. LEXIS 96792, at *14-21; In re Solutia Inc., 379
14 B.R. at 485; In re Calpine Corp., 365 B.R. 392 (Bankr. S.D.N.Y.
15 2007), rev'd on other grounds, 2011 U.S. Dist. LEXIS 62100
16 (S.D.N.Y. June 7, 2011); and In re Vest Assocs., 217 B.R. 696,
17 699 (Bankr. S.D.N.Y. 1998).

18 It is not clear whether a claim for breach of a
19 contractual make-whole provision should be viewed as a claim
20 for unmatured interest (compare In re Trico Marine Services,
21 Inc., 450 B.R. 474, 480-81 (Bankr. D. Del. 2013) (recognizing
22 split of authority but holding that claim for breach of
23 contractual make-whole is liquidated damages for breach of an
24 option to prepay, not for unmatured interest), and In re
25 Doctors Hospital of Hyde Park, Inc., 508 B.R. 596, 605-06

1 (Bankr. N.D. Ill. 2014) (claim for breach of contractual yield
2 maintenance premium is for unmatured interest not paid as a
3 result of prepayment). However, the measure of a claim based on
4 New York's rule of perfect tender or a non-call right that does
5 not provide for liquidated damages would be the difference
6 between the present value of the interest to be paid under the
7 first and 1.5 lien notes through their stated maturity and the
8 present value of such interest under the replacement notes to
9 be provided to the first and 1.5 lien holders under the chapter
10 11 plan, which should equate to unmatured interest. See
11 Charles & Kleinhaus, 15 Am. Bankr. Inst. L. Rev. at 541-42,
12 580-81. Accordingly such a claim also would be disallowed as
13 unmatured interest under section 502(b)(2) of the Bankruptcy
14 Code. It is not interest that has accrued during the
15 bankruptcy case, but would, rather, accrue in the future, at
16 least to 2015 if not to 2020, the original maturity date of the
17 notes, and, therefore, would not be an allowed claim under
18 section 502(b)(2). HSBC Bank USA v. Calpine Corp., 2010 U.S.
19 Dist. LEXIS, at *14-21.

20 The two cases relied upon by the first and the 1.5
21 lien trustees for the contrary proposition actually are
22 consistent with the foregoing analysis. The debtors in both
23 cases (unlike here) were solvent and, therefore, the courts
24 found them to be subject to an exception to section 502(b)(2)
25 of the Code's disallowance of claims for unmatured interest

1 under either equitable principles, as set forth in the
2 legislative history to section 1124 of the Bankruptcy Code (see
3 140 Cong. Rec. H 10,768 (October 4, 1994)), or because of the
4 application of the best interests test in section 1129(a)(7) of
5 the Code when the debtor is solvent. See *In re Premier*
6 *Entertainment Biloxi, LLC*, 445 B.R. at 636-37; *In re Chemtura*
7 *Corp.*, 439 B.R. at 636-37.

8 This analysis applies also to any claim premised on
9 the debtors' breach of the provision in the last sentence
10 Section 6.02 of the indentures, obliquely referenced in
11 paragraph 15 of the notes, that the issuer would under certain
12 circumstances permit the rescission of automatic acceleration
13 under Section 6.02 upon the issuer's bankruptcy. The damages
14 for breach of such a rescission right, which are unspecified in
15 both the indentures and the notes, would equate to the same
16 lost unmatured interest that would apply to a breach of the
17 right of perfect tender or non-liquidated damages non-call
18 right.

19 Accordingly, I conclude both for purposes of
20 confirmation of the debtors' chapter 11 plan, as well as for
21 Adversary Proceeding Nos. 14-08227 and 14-08228, that the plain
22 language of the first and 1.5 lien indentures and notes as
23 applied to the present facts requires the allowed claim of the
24 indenture trustees for the first and 1.5 lien holders to
25 exclude any amount for Applicable Premium or any other damages

1 based on the early payment of the notes.

2 There is no relevant commentary or conduct by the
3 parties that would or should change that view, given that there
4 is no ability to consider parol evidence in light of the plain
5 meaning of the agreements under the contract interpretation
6 cases that I have already cited. I will note, however, that the
7 trustees for the first and 1.5 lien holders have contended that
8 the disclosure in the prospectuses for their notes, while
9 lengthy, fails to highlight the risk that, upon bankruptcy and
10 the automatic acceleration of the notes, no make-whole claim or
11 other damages would be owed upon the early payment of the
12 notes.

13 It is true that there is no such disclosure. I note,
14 however, that the vast majority of risk disclosures in the
15 prospectuses, 54 risk factors, pertains to fact-based risks --
16 either market or business or product risks. Of the risk
17 factors disclosed, only six are bankruptcy-related, and they do
18 not specifically disclose material risks affecting the notes in
19 the issuer's bankruptcy in addition to the risk to the make-
20 whole claim. Two disclosed bankruptcy-related risks pertain to
21 the potential avoidance of the notes or the liens under chapter
22 5 of the Bankruptcy Code. Others state that the ability of
23 holders to realize upon their collateral and claims is subject
24 to certain bankruptcy law limitations (which may, in fact,
25 include, in broad scope, the risk that the first and 1.5 lien

1 holders may not have an allowed claim based on prepayment of
2 the notes in a bankruptcy case, although perhaps such
3 disclosure could simply be taken as a reference to the
4 imposition of the automatic stay under section 362(a) of the
5 Bankruptcy Code). But, as noted, there are other specific
6 bankruptcy risks in addition to risks to the allowance of a
7 make-whole claim that are not disclosed, including the risk of
8 being crammed down with notes payable over time, as opposed to
9 being paid in cash or reinstated, under section 1129(b)(2) of
10 the Bankruptcy Code.

11 Moreover, as observed by the Court in South Side
12 House, 2012 U.S. Dist. LEXIS 10824, at *12, the law that I have
13 applied to the first and 1.5 lien holders' make-whole claim is
14 "well-settled" and long established. It has been stated
15 readily and cogently by courts that do not specialize in New
16 York law; i.e., courts from the Seventh, Third, and Fifth
17 Circuits, the latter two from Pennsylvania and Mississippi, as
18 well as Delaware. Thus it does not appear, to the extent that
19 one would even give any weight to the disclosure, or lack
20 thereof, in the prospectuses, that the noteholders needed to be
21 specially alerted to the risk that their make-whole claims
22 might be disallowed in bankruptcy based on the automatic
23 contractual acceleration of their notes, beyond the disclosure
24 that the issuer's bankruptcy might alter the noteholders'
25 rights.

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Relatedly, as I've noted, the first and 1.5 lien trustees have sought freedom from the automatic stay under section 362(a) of the Bankruptcy Code to implement the rescission of the automatic acceleration of the notes that occurred under Section 6.02 of the indentures upon the debtors' bankruptcy filing. The mechanism for such rescission is also set forth in Section 6.02 of the indentures and is loosely referenced in paragraph 15 of the notes, which states, "Under certain circumstances, the Holders of a majority in principal amount of the outstanding Notes may rescind any such acceleration with respect to the Notes and its consequences."

The first and 1.5 lien holders want to rescind the contractual acceleration under Section 6.02 to avoid the fatal effect of such acceleration upon their make-while rights in light of their agreements' lack of the specificity required to trigger the Applicable Premium upon acceleration under New York law.

The trustees make three arguments to support their request. First, they state that the automatic stay does not actually apply to sending a rescission notice. Second, they contend that, even if the automatic stay under section 362(a) of the Code applies to such a notice, rescission is excepted from the stay by section 555 of the Bankruptcy Code. Finally, they contend that, even if the automatic stay applies, they

1 should be granted relief from the stay pursuant to section
2 362(d) of the Code.

3 I conclude that the automatic stay does, in fact,
4 apply to the sending of a rescission notice and contractual
5 deceleration of the debt. Two provisions of the Bankruptcy
6 Code's automatic stay apply here. First, section 362(a)(3) of
7 the Code states that the automatic stay upon the filing of the
8 case includes a stay of "any act to obtain possession of
9 property of the estate or property from the estate or to
10 exercise control over property of the estate." Section
11 362(a)(6) then states that the following also are stayed: "any
12 act to collect, assess or recover a claim against the debtor
13 that arose before the commencement of the case under this
14 title."

15 In essence, as I've said, the first and 1.5 lien
16 trustees seek through a rescission notice to exercise a right
17 under the indentures, which, as contracts to which the debtors
18 are a party, are property of the debtors' estates. The purpose
19 of sending a rescission notice would be to enable the holders
20 to recover a sizeable claim against the debtors -- that is, to
21 resurrect their make-whole claim, which has been loosely
22 quantified as approximating \$200 million -- through
23 deceleration of the debt. They thus seek to control property
24 of the estate by exercising a contract right to the estate's
25 detriment and recover, by decelerating, a claim against the

1 debtors.

2 The Second Circuit has recently held in a very similar
3 context that sending such a notice would, in fact, be subject
4 to the automatic stay of section 362(a). In re AMR Corp., 730
5 F.3d at 102-03 and 111-12, citing In re 48th Street Steakhouse,
6 Inc., 835 F.3d, 427 (2d Cir. 1987), and In re Enron Corp., 300
7 B.R. 201 (Bankr. S.D.N.Y. 2013), in which contract rights were
8 found to be property of the debtor and actions that had the
9 effect of terminating, or would, in fact, terminate or alter,
10 those rights, even if taken against a third party, as in 48th
11 Street Steakhouse, would therefore constitute the exercise of
12 control over property of the estate stayed by section
13 362(a)(3). See also In re Solutia Inc., 379 B.R. at 484-85.

14 Additionally, here, as in AMR and Solutia, the purpose
15 of sending such a notice would be to recover a claim against
16 the debtors, because the first and most important step in
17 recovering a make-whole claim would be to resurrect the right
18 to the Applicable Premium by decelerating the debt. Therefore,
19 it is clear that the automatic stay under section 362(a)(6) of
20 the Code also applies.

21 The trustees have argued that a rescission notice
22 would not alter what the debtors would retain under the plan,
23 and, therefore, that section 362(a)(3) should not apply,
24 because this is fundamentally, or economically, an
25 intercreditor dispute; i.e., the value -- the \$200 million --

1 that the first and 1.5 lien holders seek to include as part of
2 their claim if rescission and deceleration is permitted, would
3 otherwise effectively be distributed to the second lien holders
4 and the trade creditors under the plan.

5 However, that is not a proper reading of section
6 362(a) of the Bankruptcy Code. As noted by the court in *In re*
7 *Strata Title, LLC*, 2013 Bankr. LEXIS 1704 at *17-18 (Bankr. D
8 Az. Apr. 25, 2013), such a reading of section 362(a)(3) would
9 add a phrase to the statute that is not present, namely "unless
10 such act would provide economic value to the estate."
11 Moreover, it ignores the applicability of section 362(a)(6).

12 This is also clearly not a case, as the trustees
13 contended at oral argument, where the automatic stay wouldn't
14 apply because the transaction is only between third parties, in
15 the nature of a letter of credit draw which is not subject to
16 the automatic stay because the issuer has a separate and
17 independent obligation to the beneficiary the payment of which
18 does not control the debtor's property; rather, the effect on
19 the debtors' estates of the requested rescission and
20 deceleration would be direct -- controlling and increasing the
21 first and 1.5 lien holders' recovery of property of the estate.

22 Similarly, Second Circuit cases cited by the trustees
23 for the proposition that, "[t]he general policy behind section
24 362(a) is to grant complete immediate, albeit temporary, relief
25 to the debtor from creditors and also to prevent dissipation of

1 the debtor's assets before any distribution to creditors can be
2 effective," SEC v. Brennan, 230 F.3d 65, 70 (2d Cir. 2000), are
3 taken entirely out of context, whereas the trustees ignore
4 numerous cases, discussed below, in which the courts have
5 prohibited, as did the Second Circuit in AMR, actions that
6 would permanently alter, postpetition, the rights of creditors
7 that existed on the petition date, such as by sending notices
8 like the rescission notice at issue here.

9 It is clear that there is a difference between
10 automatic acceleration pursuant to a contract, as is the case
11 here, and acceleration generally as a matter of bankruptcy law
12 upon the commencement of a bankruptcy case for the purpose of
13 determining claims against the estate, as I'll discuss in more
14 detail when I consider whether relief should be granted from
15 the stay pursuant to section 362(d) of the Code. For present
16 purposes, however, it is sufficient to note that here a
17 contract to which the debtors are a party would specifically be
18 affected for the purpose of recovering on a claim against the
19 debtors, and, therefore, the automatic stay under section
20 362(a) of the Bankruptcy Code applies.

21 In addition, the indenture trustees make an argument
22 that was not raised in AMR or Solutia: that the sending of a
23 rescission notice to decelerate the first and 1.5 lien notes
24 would merely be liquidating a securities contract, which is
25 permissible under section 555 of the Bankruptcy Code

1 notwithstanding the automatic stay under section 362(a).

2 Section 555 of the Bankruptcy Code provides, "The
3 exercise of a contractual right of a stockbroker, financial
4 institution, financial participant or securities clearing
5 agency to cause the liquidation, termination or acceleration of
6 a securities contract as defined in section 741 of this title,
7 because of a condition of the kind specified in section 365(e)
8 of this title [i.e., so called "ipso facto" conditions such as
9 the commencement of the bankruptcy case], shall not be stayed,
10 avoided or otherwise limited by operation of any provision of
11 this title."

12 The first and 1.5 lien trustees contend that the
13 effect of the rescission notice would be to fix and, therefore,
14 liquidate, the amount of their claims in the bankruptcy case
15 and, therefore, that it would, pursuant to section 555 of the
16 Code, not be subject to the automatic stay. There are several
17 problems with this argument, however.

18 First, I have serious doubts that the indenture itself
19 is a securities contract as defined in section 741(7)(A) of the
20 Bankruptcy Code, at least with respect to this issue.

21 Generally speaking, section 741(7) of the Code's definition of
22 "securities contract," which is lengthy, states that it is a
23 contract for the purchase, sale or loan of a security.

24 Clearly, the indentures themselves are not contracts for the
25 purchase, sale or loan of a security; they instead set forth

1 the terms under which the underlying notes will be governed and
2 the role of the trustees in connection therewith. See In re
3 Qimonda Richmond, LLC, 467 B.R. 318, 323 (Bankr. D. Del. 2012),
4 holding, albeit without much discussion, that an indenture does
5 not fall within the definition of section 741(7)(A).

6 The trustees rely on subsection (A)(x) of section
7 741(7) of the Code to fit the indentures within the "securities
8 contract" definition notwithstanding that the indentures
9 themselves are not contracts for the purchase, sale or loan of
10 a security. Section 741(7)(A)(x) states, in relevant part, "A
11 'securities contract' means . . . (x) a master agreement that
12 provides for an agreement or transaction referred to in [among
13 other sub-clauses] clause (i) [that is, a contract for the
14 purchase, sale, or loan of a security, among other
15 transactions], without regard to whether the master agreement
16 provides for an agreement or transaction that is not a
17 securities contract under this subparagraph, except that such
18 master agreement shall be considered to be a securities
19 contract under this subparagraph only with respect to each
20 agreement or transaction under such master agreement that is
21 referred to in clause (i) [i.e., a contract for the purchase,
22 sale or loan of a security]."

23 It is far from clear that the indentures would be
24 viewed as such a master agreement, however, given the proviso
25 in the last clause of subsection 741(A)(x), with respect to the

1 indentures' rescission section, which does not itself pertain
2 to the purchase, sale or loan of the notes and, further,
3 because paragraph 15 of the notes does not specify any
4 rescission right but instead refers to a right that is
5 exercisable under unidentified provisions upon certain
6 unspecified circumstances.

7 Relatedly, and even more significantly, I do not
8 believe that sending the rescission notice, the consequences of
9 which, as I have stated, would enable the deceleration of the
10 notes to permit the increase of a claim against the debtors in
11 the amount of the make-wholes, is in fact covered by section
12 555 of the Bankruptcy Code, because it is not a "liquidation"
13 as contemplated by that section.

14 The customary interpretation of section 555 is that it
15 "provides a tool for the non-defaulting. . .participant to
16 exercise its contractual right to close-out, terminate or
17 accelerate a 'securities contract.' Such a close-out or
18 liquidation typically entails termination or cancellation of
19 the contract, fixing of the damages suffered by the
20 nondefaulting party based on market conditions at the time of
21 liquidation, and accelerating the required payment date of the
22 net amount of the remaining obligations and damages." In re
23 American Home Mortgage, Inc., 379 B.R. 503, 513 (Bankr. D. Del
24 2008), quoting 5 Collier on Bankruptcy, paragraph 555.04 (16th
25 ed. 2014)).

1 Here, to the contrary, the first and 1.5 lien trustees
2 look to decelerate and create a different claim than existed on
3 the bankruptcy petition date. As discussed by Judge Peck in
4 decisions in the Lehman Brothers case pertaining to a closely
5 analogues provision of the Bankruptcy Code, section 560, that
6 type of action does not fall within section 555 of the
7 Bankruptcy Code, which, with its companion sections, is a
8 narrow provision that should not be used to improve a contract
9 party's standing or claim in the bankruptcy case. See Lehman
10 Brothers Special Fin. Inc. v. Ballyrock AGS CDO 2007-1 Ltd.,
11 452 B.R. 31, 40 (Bankr. S.D.N.Y. 2011), in which Judge Peck
12 held that, rather than exercising a right subject to the safe
13 harbor of section 560 of the Code, the parties were
14 impermissibly seeking to improve their positions. See also In
15 re Lehman Brothers Holdings, Inc., 502 B.R. 383, 386 (Bankr.
16 S.D.N.Y. 2013), discussing Ballyrock and Lehman Brothers
17 Special Fin. Inc. v. BNY Corporate Trading Services Ltd., 422
18 B.R. 407, 421 (Bankr. S.D.N.Y. 2010).

19 Moreover, the rescission right sought to be exercised
20 here is not a right automatically arising upon the commencement
21 of the debtors' bankruptcy case and, thus, covered by section
22 365(e) of the Bankruptcy Code as referenced in section 555. As
23 noted, the trustees instead seek to decelerate debt that was
24 automatically accelerated under Section 6.02 of the indentures
25 upon the bankruptcy filing. Thus, the exercise of the

1 rescission right does not fall within the plain language of
2 section 555 of the Code.

3 I have also concluded, in large measure based upon the
4 AMR case, that relief from the automatic stay should not be
5 granted here under section 362(d) of the Bankruptcy Code. The
6 Second Circuit in AMR affirmed Judge Lane's determination in
7 the exercise of his discretion not to lift the automatic stay
8 to permit a similar notice to be sent. 730 F.3d at 111-12.

9 The trustees argue for stay relief under both sections
10 362(d)(1) and (d)(2) of the Code. I conclude that subsection
11 (d)(2) is not applicable here. It provides for "relief from
12 the stay provided under subsection (a) of this section with
13 respect to a stay of an act against property under subsection
14 (a) of this section if (A) the debtor does not have an equity
15 in such property; and (B) such property is not necessary to an
16 effective reorganization." Here, the debtors convincingly
17 argued that subsection 362(d)(2) was intended to address, and
18 does, by its terms, address, acts against property in which a
19 creditor has an interest, such as a lien interest, as opposed
20 to a right against a contract or to exercise a right under a
21 contract, such as under Section 6.02 of the indentures. See In
22 re Motors Liquidation Company, 2010 U.S. Dist. LEXIS 125182, at
23 *8-9 (S.D.N.Y. Nov. 17, 2010).

24 Moreover, under section 362(g) of the Code, the movant
25 has the burden to show that the debtor does not have an equity

1 in such property under section 362(d)(2)(A), and I believe that
2 it was conceded during oral argument, and, in any event, I so
3 find, that the first and 1.5 lien trustees have not sustained
4 that burden. It is not clear to me how they possibly could
5 have shown that the debtors have no equity in the indentures,
6 given that, before a rescission the trustees' claims pursuant
7 to the indentures are worth far less, perhaps \$200 million
8 less, than if the trustees obtain relief from the stay for
9 rescission. That \$200 million would establish, I believe, the
10 debtors' equity in light of the fact that the trustees do not
11 have a lien on or other prior interest in the indentures.

12 That leaves the trustee's request for relief under
13 section 362(d)(1) of the Bankruptcy Code, which provides for
14 relief from the automatic stay "for cause, including a lack of
15 adequate protection of an interest in property of such party-
16 in-interest." As noted, we are not dealing with a lien or
17 other prior interest in property held by the indenture
18 trustees; we are dealing with their desire to exercise a
19 contract right, rescission. Therefore, the Second Circuit's
20 Sonnax case, which applies generally where relief from the stay
21 is sought for purposes other than to enforce an interest in
22 property, controls. In re Sonnax Industries, 907 F.2d 1280,
23 1285-86 (2d Cir. 1990) (setting forth factors that may be
24 relevant to a determination on a request to lift the automatic
25 stay in such circumstances); see also In re Bogdanovich, 292

1 F.3d 104, 110 (2d Cir. 2002). AMR applied the Sonnax factors
2 in this context. 730 F.3d at 111-12.

3 As I noted earlier, the sending of a rescission, or
4 deceleration notice significantly impacts the debtors' estate
5 and creditors -- in this case by enhancing claims potentially
6 by hundreds of millions of dollars. It is, therefore, the type
7 of action that courts have routinely refused to permit under
8 section 362(d)(1) of the Bankruptcy Code. As noted by Judge
9 Beatty in *In re Solutia*, 379 B.R. at 488, a contractual
10 acceleration provision goes well beyond the acceleration that
11 occurs as a matter of bankruptcy law with respect to the
12 determination of claims against the estate. One can, as
13 discussed in *In re Solutia*; *In re Manville Forests Products*
14 *Corp.*, 43 B.R. 293, 297-98 (Bankr. S.D.N.Y.) and *HSBC Bank USA*
15 *v. Calpine Corp.*, 2010 U.S. Dist. LEXIS 96792, at *10-11,
16 observe that as a matter of law the filing of the bankruptcy
17 case itself accelerates debt. However, a contractual
18 acceleration provision advances the maturity date of the debt
19 in ways that have consequences in the bankruptcy case beyond
20 the operation of this general bankruptcy law principle. For
21 example, such acceleration may give rise to a right to damages
22 under section 1124(2)(C) of the Bankruptcy Code if the debtor
23 later attempts to decelerate and reinstate the debt. It also
24 may give the creditor a right to a different type or amount of
25 interest; and the presence or absence of such a provision may

1 also affect rights against other parties including co-debtors.
2 See, e.g., *In re Texaco, Inc.*, 73 B.R. 960 (Bankr. S.D.N.Y.
3 1987). In that case, because there was no automatic
4 contractual acceleration provision, noteholders sought to send
5 an acceleration notice that would give them the right to an
6 increased interest rate under their agreement. The court
7 declined to lift the automatic stay. *Id.* at 968, stating that
8 the noteholders sought more than simply to preserve the
9 prepetition status quo. See also *In re Metro Square*, 1988
10 Bankr. LEXIS 2864, at *7-9 (Bankr. D. Minn., August 10, 1988).
11 And, as noted, by Judge Lifland in *In re Manville Forest*
12 *Products*, 43 B.R. at 298 n.5, "While the Court today holds that
13 sending a notice of acceleration is unnecessary to file a claim
14 against a debtor for the entire amount of the debt, despite the
15 actual maturity date or the terms of the contract, this does
16 not apply where notice is required as a condition precedent to
17 establish other substantive contractual rights such as the
18 right to receive a post-default interest rate. In that case,
19 the sending of such notice would be ineffective under the
20 automatic stay provisions of the Code if done without the
21 provision of the bankruptcy court." Of course, Judge Lane
22 performed a similar analysis in denying the trustee's request
23 for stay relief in *In re AMR Corp.*, 485 B.R. 279, 295-96
24 (Bankr. S.D.N.Y. 2013), *aff'd* 730 F.2d at 111-12.

25 Thus, the first and 1.5 lien trustees' request for

1 stay relief should not be granted to permit such a material
2 change to be effectuated. Key "Sonnax factors" regarding the
3 impact of rescission and deceleration on the parties and on the
4 case strongly argue against granting such relief. Therefore,
5 in the exercise of my discretion under section 362(d)(1) of the
6 Code, I conclude that the automatic stay should not be lifted
7 to enable the resurrection of a make-whole claim by means of
8 the rescission of the automatic acceleration provided for in
9 Section 6.02 of the indentures.

10

11 As previously noted, the holders of the first and 1.5
12 lien notes have voted as classes to reject confirmation of the
13 debtors' chapter 11 plan. The plan otherwise meets, as I've
14 stated, the confirmation requirements of section 1129(a) of the
15 Bankruptcy Code. But, to be confirmed over the objection of
16 the objecting classes comprising the first and 1.5 lien
17 holders, the plan must also satisfy the "cram down"
18 requirements of section 1129(b) of the Bankruptcy Code. At
19 issue is whether section 1129(b)(2) of the Code has been
20 satisfied, there being no objection to the cramdown
21 requirements pertaining to secured creditors set forth in
22 section 1129(b)(1) with the exception of its requirement that
23 the a plan be "fair and equitable," which term is defined in
24 section 1129(b)(2).

25

Section 1129(b)(2) of the Bankruptcy Code states, "For

1 the purpose of this subsection, the condition that a plan be
2 fair and equitable with respect to a class includes the
3 following requirements: (A) With respect to a class of secured
4 claims, the plan provides -- (i)(I) that the holders of such
5 claims retain the liens securing such claims, whether the
6 property subject to such liens is retained by the debtor or
7 transferred to another entity, to the extent of the allowed
8 amount of such claims; and (II) that each holder of a claim of
9 such class receive on account of such claim deferred cash
10 payments totaling at least the allowed amount of such claim, of
11 a value, as of the effective date of the plan, of at least the
12 value of such holder's interest in the estate's interest in
13 such property." Section 1129(b)(2)(A)(ii) and (iii) set forth
14 two other ways under which a plan can be "fair and equitable"
15 to a dissenting secured class, but neither is applicable here,
16 the debtors relying, instead, on section 1129(b)(2)(A)(i).

17 The only issue as to whether the debtors' chapter 11
18 plan satisfies section 1129(b)(2)(A)(i) of the Code is whether
19 the plan provides, as set forth in sub-clause (A)(i)(II), that
20 the holders of the first and 1.5 lien notes will "receive on
21 account of such claim deferred cash payments totaling the
22 allowed amount of such claim, of a value, as of the effective
23 date of the plan, of at least the value of such holder's
24 interest in the estate's interest in such property." (Sub-
25 clause (A)(i)(I) is satisfied because under the plan the first

1 and 1.5 lien holders shall retain the liens securing their
2 claims to the extent of their allowed secured claims. Their
3 liens are not being diminished under the plan, and, as I have
4 previously found, those liens will secure the allowed amount of
5 their claims.)

6 Whether the plan satisfies section
7 1129(b)(2)(A)(i)(II) of the Code depends on the proper present
8 value interest rate under the replacement notes to be issued to
9 the first and 1.5 lien holders under the plan on account of
10 their allowed claims, given that those notes will satisfy their
11 claims over seven and seven-and-a-half years, respectively.
12 The debtors contend that the interest rates under the
13 replacement notes are sufficient on a present value basis to
14 meet the test of section 1129(b)(2)(A)(i)(II).

15 The interest rate on the new replacement first lien
16 notes that are proposed to be issued under the plan is the
17 seven-year Treasury note rate plus 1.5 percent. As of August
18 26, 2014, the date of my bench ruling, that would equal an
19 approximately 3.60 percent interest rate, based on public data
20 issued for such Treasury notes. The proposed replacement notes
21 for the 1.5 lien holders would have an interest rate equal to
22 an imputed seven-and-a-half-year Treasury note (based on the
23 weighted averaging of the rates for seven-year and ten-year
24 Treasury notes) plus 2 percent, which as of August 26, 2014 I
25 calculated as approximately 4.09 percent based on public data

1 for such Treasury notes.

2 The indenture trustees for the first and the 1.5 lien
3 holders contend that those rates do not satisfy the present
4 value test in section 1129(b)(2)(A)(i)(II) of the Code and
5 argue for higher interest rates under the replacement notes
6 based on their view of what market-based lenders would expect
7 for new notes if the same tenor issued by comparable borrowers.

8 The Court clearly is not writing on a blank slate on
9 this issue. It is largely governed by the principles
10 enunciated by the plurality opinion in *Till v. SCS Credit*
11 *Corp.*, 541 U.S. 465 (2004), and, to the extent that the Court
12 has any concerns based on *Till* being a plurality opinion, *In re*
13 *Valenti*, 105 F.3d 55 (2d Cir. 1997).

14 Both of those cases analyzed and applied a closely
15 analogous provision in chapter 13 of the Bankruptcy Code,
16 section 1325(a)(5)(B)(i)(II), which states that, among other
17 things required to confirm a plan with respect to an allowed
18 secured claim, the plan must provide that, "the value, as of
19 the effective date of the plan, of property to be distributed
20 under the plan on account of such claim is not less than the
21 allowed amount of such claim." As noted by the Court in *Till*,
22 this provision is not only closely analogous to other
23 provisions of the Bankruptcy Code (including section
24 1129(b)(2)(A)(i)(II) that I have just quoted), but also
25 "Congress likely intended bankruptcy judges and trustees to

1 follow essentially the same approach when choosing an
2 appropriate interest rate under any of the many Code provisions
3 requiring a court to discount a stream of deferred payments
4 back to their present dollar value." 541 U.S. at 474.
5 Valenti, which was cited favorably in Till and which applies
6 generally the same approach as Till to the proper present value
7 interest rate for chapter 13 plan purposes, has also been
8 construed as applying in a chapter 11 context to the cramdown
9 of a secured creditor under section 1129(b)(2)(A)(i)(II). In re
10 Marfin Ready Mix Corp., 220 B.R. 148, 158 (Bankr. E.D.N.Y.
11 1998). As discussed later, there is no sufficiently contrary
12 basis to distinguish the chapter 13 and chapter 11 plan
13 contexts in light of the similarity of the language of the two
14 provisions and the underlying present value concept that Till
15 recognized should be applied uniformly throughout the Code.

16 Till and Valenti establish key first principles that I
17 should follow, therefore, when considering the proper interest
18 rate to present value a secured creditor's deferred
19 distributions under a plan for cramdown purposes. Both cases
20 quite clearly rejected alternatives that were proposed, and
21 have been proposed now by the first and 1.5 lien trustees, that
22 require a market-based analysis or inquiry into interest rates
23 for similar loans in the marketplace. That is, both cases
24 rejected the so-called "forced loan" or "coerced loan"
25 approach, which Valenti defined as adopting the "interest rate

1 on the rate that the creditor charges for loans of similar
2 character, amount, and duration to debtors in the same
3 geographic region." 105 F.3d at 63. See Till, 541 U.S. at 477,
4 where the Court rejected market-based methodologies in favor of
5 the so-called "formula approach":

6 [We] reject the coerced loan, presumptive contract
7 rate, and cost of funds approaches. Each of these
8 approaches is complicated, imposes significant
9 evidentiary costs, and aims to make each individual
10 creditor whole rather than to ensure the debtor's
11 payments have the required present value. For example,
12 the coerced loan approach requires bankruptcy courts to
13 consider evidence about the market for comparable loans
14 to similar (though nonbankrupt) debtors -- an inquiry
15 far removed from such courts' usual task of evaluating
16 debtors' financial circumstances and the feasibility of
17 their debt adjustment plans. In addition, the approach
18 overcompensates creditors because the market lending
19 rate must be high enough to cover factors, like
20 lenders' transaction costs and overall profits, that
21 are no longer relevant in the context of court-
22 administered and court-supervised cramdown loans.

23 541 U.S. at 477. See also *In re Valenti*, 105 f.3d at 63-4,
24 (rejecting forced loan approach in favor of a formula
25 approach). Of course the so-called "presumptive contract rate,"

1 that Till rejected was also a market-based test based on the
2 parties' prepetition interest rate as adjusted for current
3 market factors, as, in lesser degree, was the "cost of funds"
4 approach that Till also rejected, which was based on the
5 creditor's cost of capital, again tracking a market, although,
6 in that case, with the emphasis on the creditor's
7 characteristics rather than the debtor's.

8 Both courts stated similar reasons for rejecting
9 market-based approaches in setting a cramdown rate. As stated
10 in Valenti, "the 'forced loan' approach misapprehends the
11 'present value' function of the interest rate. The objective
12 of Section 1325(a)(5)(B)(ii) is to put the creditor in the same
13 economic position it would have been in had it received the
14 value of its allowed claim immediately. The purpose is not to
15 put the creditor in the same position that it would have been
16 in had it arranged a 'new' loan." (Emphasis in the original).
17 105 F.3d at 63-4. "Moreover, as our analysis in the preceding
18 section illustrates, the value of a creditor's allowed claim
19 does not include any degree of profit. There is no reason,
20 therefore, that the interest rate should account for profit."
21 Id. at 64. Similarly, Till distinguished the cramdown rate
22 from market loans; the former does not require the lender to be
23 indifferent compared to the result in a foreclosure, where the
24 creditor could then re-lend the proceeds in the marketplace,
25 541 U.S. at 476 , and should not "overcompensate[] creditors

1 because the market lending rate must be high enough to cover
2 factors, like lenders' transaction costs and overall profits,
3 that are no longer relevant in the context of court-
4 administered and court-supervised cramdown loans." Id. 541 U.S.
5 at 477-78.

6 The cramdown rate analysis, therefore, should focus on
7 a rate that does not take market factors into account but,
8 rather, starts with the riskless rate applicable to all
9 obligations to be paid over time, adjusted for the risks unique
10 to the debtor in actually completing such payment. Id. 541
11 U.S. at 474-80. It should thus be a relatively simple, uniform
12 approach consistent with bankruptcy "courts' usual task of
13 evaluating the feasibility of their debt adjustment plans" not
14 on costly and expensive evidentiary hearings to discern
15 marketplace data. Id. 541 U.S. at 477; see also *In re Valenti*,
16 105 F.3d at 64.

17 As noted, in light of the foregoing considerations the
18 Supreme Court adopted, as did the Second Circuit in *Valenti*
19 before it, a formula approach, which is also the approach
20 adopted by the debtors (in contrast to the trustees for the
21 first and 1.5 lien holders, who have utilized a market-based
22 approach) with respect to the replacement notes to be issued
23 under the plan. Under the formula approach, the proper rate for
24 secured lenders' cramdown notes begins with a risk-free base
25 rate, such as the prime rate used in *Till*, or the Treasury rate

1 used in Valenti, which is then adjusted by a percentage
2 reflecting a risk factor based on the circumstances of the
3 debtor's estate, the nature of the collateral security and the
4 terms of the cramdown note itself, and the duration and
5 feasibility of the plan. Till, 541 U.S. at 479; Valenti, 104
6 F.3d at 64. Both Till and Valenti held that, generally
7 speaking, the foregoing risk adjustment should be between 1 and
8 3 percent above the risk-free base rate. Id.

9 It is clear from those opinions that the formula
10 approach's risk adjustment is not a back door to applying a
11 market rate. Indeed, the Supreme Court stated, "We note that
12 if the Court could somehow be certain a debtor would complete
13 his plan, the prime rate would be adequate to compensate any
14 secured creditors forced to accept cramdown loans." 541 U.S.
15 at 479 n.18. That is, no adjustment whatsoever to the risk-
16 free rate would be required if the Court found that the debtors
17 were certain to perform their obligations under the replacement
18 notes. The focus, therefore, should be generally on the risk
19 posed by the debtor within a specified band, as opposed to
20 market rates charged to comparable companies. Nothing could be
21 clearer than the two Courts' statements on that point.
22 Therefore, as a first principle, the cramdown interest rate,
23 under section 1129(b)(2)(A)(i)(II) of the Code, should not
24 contain any profit or cost element, which were rejected by Till
25 and the Second Circuit in Valenti as inconsistent with the

1 present-value approach for cramdown purposes. In addition,
2 market-based evidence should not be considered, except,
3 arguably and, if so secondarily, when setting a proper risk
4 premium in the formula approach taken by Till and Valenti.

5 Notwithstanding this very clear guidance, some courts,
6 and the first and 1.5 lien trustees here, have argued that a
7 market rate test should nevertheless be followed in chapter 11
8 cases. They have relied, as they must since there is no other
9 basis in Till or Valenti for the argument, entirely on footnote
10 14 in Till, which appears at 541 U.S. 476.

11 That footnote states, "This fact helps to explain why
12 there is no readily apparent Chapter 13 cramdown market rate of
13 interest. Because every cramdown loan is imposed by a court
14 over the objection of a secured creditor, there is no free
15 market of willing cramdown lenders. Interestingly, the same is
16 not true in the Chapter 11 context, as numerous lenders
17 advertise financing for Chapter 11 debtors-in-possession."
18 (Emphasis in the original.)

19 Till's footnote 14 then cites certain web site
20 addresses that advertise such financing, and continues, "Thus,
21 when picking a cramdown rate in a Chapter 11 case, it might
22 make sense to ask what rate an efficient market would produce.
23 In the Chapter 13 context, by contrast, the absence of any such
24 market obligates courts to look to first principles and ask
25 only what rate will fairly compensate a creditor for its

1 exposure."

2 I have the following reactions to that discussion.

3 First, as is clear from its introductory clause, Till's
4 footnote 14 is referring to a specific fact alluded to in the
5 sentence to which it is footnoted, which is that the cramdown
6 rate of interest does not "require that the creditors be made
7 subjectively indifferent between present foreclosure and future
8 payment," that is, between future payment under the plan and
9 how the creditor would put its money to use lending to similar
10 borrowers after a foreclosure in the marketplace. Id. And
11 then the Court says, "Indeed the very idea of a cramdown loan
12 precludes the latter result: By definition, a creditor forced
13 to accept such a loan would prefer instead to foreclose."
14 (Emphasis in the original.) Therefore, footnote 14's statement
15 that "this fact helps to explain why there is no readily
16 apparent Chapter 13 cramdown market rate of interest," is
17 referring to a willingness to lend to a debtor in bankruptcy
18 but does so in a context that very clearly rejects the lender's
19 right or to be rendered indifferent to cramdown or to be
20 compensated for cramdown purposes on a market basis. More
21 specifically, footnote 14 refers to debtor-in-possession
22 financing, where third parties seek to lend money to a debtor
23 and the debtor seeks to borrow it, in contrast to opposing the
24 debtor's forced cramdown "loan."

25 (As an aside, I should note that Till has been

1 criticized for its understanding of debtor-in-possession, or
2 "DIP" loans, and I believe no case has suggested that a DIP
3 loan rate should be used as the rate for a cramdown present-
4 value calculation. The criticism is found in 7 Collier on
5 Bankruptcy, paragraph 1129.05[c][i] (16th ed. 2014), where the
6 editors state, "The problem with this suggestion" -- i.e.,
7 footnote 14's reference to DIP loans -- "is that the relevant
8 market for involuntary loans in Chapter 11 may be just as
9 illusory as in Chapter 13. The reason for this illusion is the
10 inapt and unstated inference the Court makes with respect to
11 the similarity between the interest rates applicable to debtor-
12 in-possession financing and the interest rates applicable to
13 loans imposed upon dissenting creditors at cramdown. While
14 both types of financing can occur in a Chapter 11 case, that
15 may be the extent of their similarity. Debtor-in-possession
16 financing occurs at the very beginning of the case, while the
17 determination of a cramdown rate, under Section 1129(b)(2),
18 occurs at confirmation. Thus, instead of the interim and
19 inherently more uncertain risk present in debtor-in-possession
20 financing, the court, at confirmation, is presented with a less
21 risky, more stable and restructured debtor. The fact that the
22 debtor is more stable is bound up in the court's necessary
23 feasibility determination under Section 1129(a)(11). In
24 addition, common risk factors, such as the loan's term and the
25 level of court supervision, differ greatly between the two

1 types of financing. There are many more differences, but they
2 can be summed up as follows: loans imposed at confirmation
3 resemble more traditional exit or long-term financing than
4 interim debtor-in-possession financing.")

5 Thus it was not general financing in the marketplace
6 that Till was focusing on in footnote 14, because, again, it
7 was describing loans that lenders want to make to the debtor
8 itself, not loans that they could make with the proceeds of a
9 foreclosure or in the marketplace to similarly situated
10 borrowers. This is made clear by footnote 15 in Till, as well
11 as footnote 18 that I previously quoted. Footnote 15 states
12 that the Court disagrees with the district court's coerced loan
13 approach, which "aims to set the cramdown interest rate at the
14 level the creditor could obtain from new loans of comparable
15 duration and risk." 541 U.S. at 477 n.15. Moreover, as noted
16 before, the Court actually contemplated, in footnote 18,
17 literally no premium on top of the risk-free rate if it could
18 be determined with certainty that the debtor would complete the
19 plan. Id. 541 U.S. at 479 n.18.

20 In addition, there clearly was some form of market for
21 automobile loans to debtors like the debtors in the Till case.
22 That market, in fact, had a lot of data behind it. Id. 541 U.S.
23 at 481-82; 495 n.3 (dissenting opinion). Nevertheless, the
24 Court felt constrained to refer to it as not a "perfectly
25 competitive market," Id. 541 U.S. at 481, for which Justice

1 Scalia's dissent somewhat berated the plurality. Id. 541 U.S.
2 at 494-95. Indeed, based on my experience reviewing hundreds,
3 if not thousands, of reaffirmation agreements and other matters
4 involving auto loans, there are and always have been active
5 markets for such loans, just as the value of cars and trucks is
6 tracked in readily accessible market guides. Put differently,
7 there are far more lenders and borrowers for auto loans, with
8 access to more public data, than lenders and borrowers with
9 respect to DIP or exit financing in chapter 11 cases. In this
10 case, for example, the evidence shows that there were only
11 three available exit lenders to the debtors, who eventually
12 combined on proposed backup takeout facilities while seeking to
13 keep confidential their fees and rate flex provisions.

14 This reality, as well as the fact that the plurality
15 in Till felt the need discount less than a "perfectly
16 competitive market," underscores, along with the rest of the
17 opinion, that footnote 14 is a very slim reed indeed on which
18 to require a market-based approach in contrast to every other
19 aspect of Till. Certainly there is no meaningful difference
20 between the chapter 11, corporate context and the chapter 13,
21 consumer context to counter Till's guidance that courts should
22 apply the same approach wherever a present value stream of
23 payments is required to be discounted under the Code. Id. 541
24 U.S. at 474. The rights of secured lenders to consumers and
25 secured lenders to corporations are not distinguished in Till,

1 nor should they be. Nor does the relative size of the loan or
2 the value of the collateral matter under Till's footnote 14,
3 as it should not. Till does state that a chapter 13 trustee
4 supervises the debtor's performance of his or her plan, id. 541
5 U.S. at 477; however, with replacement notes overseen by an
6 indenture trustee for sophisticated holders, there will at
7 least be comparable supervision under the debtors' plan,
8 particularly in a district like this where secured claims often
9 are paid "outside" of chapter 13 plans and, therefore, the
10 chapter 13 trustee will not know whether the debtor has
11 defaulted on the secured debt post-confirmation.

12 In sum, then, footnote 14 should not be read in a way
13 contrary to Till and Valenti's first principles, which are,
14 instead of applying a market-based approach, a present value
15 cramdown approach using an interest rate that takes the profit
16 out, takes the fees out, and compensates the creditor under a
17 formula starting with a base rate that is essentially riskless,
18 plus up to a 1 to 3 percent additional risk premium, if any, at
19 least as against the prime rate, for the debtor's own unique
20 risks in completing its plan payments coming out of bankruptcy.

21 As I've stated, certain courts, nevertheless, have
22 required a two-step approach, that is, first inquiring whether
23 there is an efficient market, not for DIP loans, but for
24 financing generally for borrowers like the debtor, and only if
25 there is no such market, applying the formula approach as set

1 forth in Till and Valenti.

2 The leading case taking this approach is *In re*
3 *American HomePatient, Inc.*, 420 F.3d 559 (6th Cir. 2005), cert.
4 denied, 549 U.S. 942 (2006). It is clear from that case,
5 however, that prior to Till the Sixth Circuit, in contrast to
6 the Second Circuit, had applied the coerced-loan method, *id.* at
7 565-66, and then concluded that, given that Till was not on all
8 fours, it should continue to apply the coerced-loan approach
9 unless there was no efficient market. *Id.* at **568**. This is, of
10 course, in contrast to this Court's duty to follow the guidance
11 offered by Valenti, as well as Till.

12 Other courts applying *American HomePatient's* two-step
13 approach include *Mercury Capital Corp. v. Milford Connecticut*
14 *Associates, L.P.*, 354 B.R. 1, 11-2 (D. Conn. 2006) (remanding
15 to the bankruptcy court to make an efficient market rate
16 analysis); *In re 20 Bayard Views LLC*, 445 B.R. 83 (Bankr.
17 E.D.N.Y. 2011) (undertaking, after an eleven-day trial, a
18 market analysis before concluding that there was no efficient
19 market for Till purposes, and then applying the Till formula
20 approach); and *In re Cantwell*, 336 B.R. 688, 692-93 (Bankr. D.
21 N.J. 2006) (applying Till formula approach in the absence of
22 "an efficient market").

23 I conclude that such a two-step method, generally
24 speaking, misinterprets Till and Valenti and the purpose of
25 section 1129(b)(2)(A)(i)(II) of the Code based on the clear

1 guidance of those precedents.

2 Further, as noted by the Fifth Circuit in *In re Texas*
3 *Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d 324 (5th Cir.
4 2013), the first step of the two-step approach is almost, if
5 not always, a dead end. As that decision observed, the vast
6 majority of cases have ultimately applied a Till prime-plus
7 approach or base rate-plus approach to the chapter 11 cramdown
8 rate, either having spent considerable time determining that
9 there is no efficient market or simply by moving to the base-
10 rate-plus formula in the first instance. *Id.* at 333-34 (citing
11 cases). This should not be surprising because it is highly
12 unlikely that there will ever be an efficient market that does
13 not include a profit element, fees and costs, thereby violating
14 Till and Valenti's first principles, since capturing profit,
15 fees and costs is the marketplace lender's reason for being.
16 That is, as acknowledged by counsel for the trustees in oral
17 argument, market lenders need to be rewarded, or to receive a
18 profit. (Moreover, the two-step approach has a perverse
19 underpinning: if the debtor is healthy enough to correspond to
20 borrowers who could receive comparable loans in the
21 marketplace, it would in all likelihood have to pay a higher
22 cramdown rate than under the Till and Valenti formula approach
23 for debtors who could not obtain a comparable loan in the
24 market.)

25 The indenture trustees nevertheless argue that the

1 debtors' case is unique, or at least highly unusual, in that
2 the debtors have substantially contemporaneously with
3 confirmation obtained backup loan commitments to fund the cash-
4 out alternative if the first lien and 1.5 lien holder classes
5 had voted to accept the plan. Specifically the debtors obtained
6 commitments for a \$1 billion first lien backup takeout facility
7 and a bridge facility of \$250 million. Those commitments
8 provide for higher rates than the replacement notes under the
9 plan for the first and the 1.5 lien holders.

10 For the committed first lien backup takeout facility,
11 the rate is LIBOR plus 4 percent, with a floor for LIBOR of 1
12 percent. Because LIBOR is, at this time, approximately .15
13 percent, effectively this would be a five percent rate. (There
14 is also an alternative base rate for this facility that, given
15 today's prime rate of approximately 3.25 percent, would be 6.25
16 percent, which is, however, exercisable at the debtors'
17 option.) The committed bridge facility provides for a rate of
18 LIBOR plus 6 percent, increasing in .5 percent increments every
19 three months, to a capped amount. It appears relatively clear
20 that the debtors intend, if rates remain low, to take out that
21 facility before it increases precipitously.

22 The trustees have argued that these backup takeout
23 loans should be viewed as proxies for the Till formula rate,
24 even though -- or, according to the trustees, because -- they
25 are based on a market process, albeit one, as discussed above

1 that was relatively opaque and involved only three lenders who
2 ultimately combined to provide the commitments on a semi-
3 confidential basis.

4 Again, however, I believe that the trustees are
5 misreading Till and Valenti in their emphasis on the market.
6 In addition, it is clear to me that no private lender,
7 including the lenders who the debtors have obtained backup
8 takeout commitments from, would lend without a built-in profit
9 element, let alone recovery for costs and fees, which also, as
10 discussed above, is contrary to Till and Valenti's first
11 principles and the purpose of section 1129(b)(2)(A)(i)(II).

12 The indenture trustees state that I should assume that
13 all of the back-up lenders' profit is subsumed in the upfront
14 fees that are to be charged under the agreements, as well as an
15 availability fee, but they have not offered any evidence or
16 rationale for that proposition I decline to assume that there
17 is no profit element in the backup facilities' rates. The
18 trustee also have offered no evidence of any profit element
19 that could be backed out of the back-up loans. Therefore, I'm
20 left with the conclusion that there is, in fact, a profit
21 element which is unspecified and unquantified in the backup
22 loans, which, therefore, makes these two loans, even if I were
23 to accept a market-based approach, at odds with Till and
24 Valenti, as well as the courts that have followed Till in the
25 absence of any clear market for coercive loans and those courts

1 that have that followed Till or Valenti in a chapter 11 context
2 without considering markets at all, including In re Village at
3 Camp Bowie I LP, 454 B.R. 702, 712-13 (Bankr. N.D. Tex. 2011);
4 In re SW Boston Hotel Venture, LLC, 460 B.R. 38, 56 (Bankr. D.
5 Mass. 2011); In re Lilo Props., LLC, 2011 Bankr. LEXIS 4407, at
6 *3-6 (Bankr. D. Vt. Nov. 4, 2011); and In re Marfin Ready Mix
7 Corp., 220 B.R. at 158.

8 I conclude, therefore, that Till and Valenti's formula
9 approach is appropriate here, that is, that the debtors are
10 correct in setting the interest rates on the first and 1.5 lien
11 replacement notes premised on a base rate that is riskless, or
12 as close to riskless as possible, plus a risk premium in the
13 range of 1 to 3 percent, if at all, depending on the Court's
14 assessment of the debtors' ability to fully perform the
15 replacement notes.

16 The first and 1.5 lien trustees have next challenged
17 the debtors' analysis of the risk premium. As noted, that risk
18 premium for the first lien replacement notes is 1.5 percent on
19 top of the seven-year Treasury note rate, and with respect to
20 the replacement notes for the 1.5 lien holders, it is 2 percent
21 on top of an imputed seven-and-one-half-year Treasury note
22 rate. I believe that, in light of the factors to be considered
23 when deciding the proper risk premium under the Till and
24 Valenti formula approach, namely, the circumstances of the
25 debtors' estate, the nature of the security (both the

1 underlying collateral and the terms of the new notes), and the
2 duration and feasibility of the reorganization plan, the
3 debtors have also performed a proper analysis of the risk
4 premium.

5 The record on this issue consists primarily of the
6 declaration and testimony of Mr. Carter (the debtor's CFO), the
7 the expert reports and testimony of Mr. Derrough (the debtors'
8 investment banker), and the expert reports and testimony of Mr.
9 Augustine (the first lien trustee's investment banker) and the
10 expert reports of Mr. Kearns (the 1.5 lien trustee's investment
11 banker).

12 The only meaningful analysis of the debtors'
13 underlying economic condition and the only projections were
14 those undertaken by the debtors in the process testified to by
15 Mr. Carter and Mr. Derrough. I conclude that such analysis and
16 projections resulted from a rigorous process based upon the
17 debtors' bottoms-up, as well as top-down, budgeting activity
18 for 2014, as well as the debtors' actual results for 2013. The
19 process benefitted, I believe substantially, from the input not
20 only of Mr. Derrough and his team at Moelis, but also from
21 testing by the debtors' future shareholders, including the
22 members of the ad hoc committee of second lien holders and
23 Apollo, who have committed, with others, to invest \$600 million
24 of equity in the reorganized debtors under the plan, in
25 addition to agreeing to receive only equity on account of their

1 notes.

2 Although there was considerable kibbitzing by Messrs.
3 Augustine and Kearns regarding the debtors' projections, they
4 engaged in no independent testing of them. Nor did they engage
5 in a rigorous testing of those projections other than to point
6 out that in the past eight of nine years the debtors have
7 missed their projections, sometimes materially. Those eight or
8 nine years of projections did not have the benefit of vetting
9 by Moelis and the second lien holders, however, that I have
10 discussed. Nor have Messrs. Augustine and Kearns conducted a
11 valuation of the collateral or of the debtors as a going
12 concern, accepting, essentially, the debtors' valuations.

13 In addition, it was pointed out that the debtors have
14 missed their projections for the first quarter of this case,
15 where there was input from, I can assume, independent third
16 parties interested in making sure the projections were
17 accurate. However, I found credible Mr. Carter's testimony on
18 this point (as I found Mr. Carter generally credible), which
19 was that those downward results for the post-bankruptcy period
20 were largely attributable to the effects of the bankruptcy
21 case, which would be ameliorated if not ended by the debtors'
22 emergence from bankruptcy and re-regularization of customer and
23 supplier relationships.

24 As far as the analysis is concerned, the post-
25 bankruptcy collateral coverage for the first and 1.5 lien

1 replacement notes is substantially better than the coverage in
2 the Till case. Even with a twenty percent variance for each of
3 the five years of the debtors' projections, it appears clear
4 that the replacement notes would be repaid in full,
5 particularly given the fact that I have found that there will
6 be no make-whole amount included in the principal amount of the
7 loans. Here, the first and 1.5 lien holders' new collateral
8 coverage, unlike in Till (where it was one-to-one, the debt
9 equaling the current value of the collateral, 541 U.S. at 470),
10 and unlike in In re 20 Bayard Views (where it also was one-to-
11 one with considerable execution risk, 445 B.R. at 112), has a
12 large cushion. Here, the debt under the replacement notes is
13 approximately 50 to 75 percent less than the value of the
14 collateral therefor, and closer to 50 percent than 75 percent.
15 Gross debt leverage also will substantially decrease under the
16 plan, from 17.8 percent to 5.6 percent, or from \$4.4 billion in
17 debt down to \$1.3 billion.

18 In light of those considerations, as well as the
19 telling fact that there is a committed \$600 million equity
20 investment under the plan, one can assume that, in the nature
21 of risk for debtors emerging from bankruptcy, the 1.5 and 2
22 percent factors chosen by the debtors are appropriate.

23 In response, the first and 1.5 lien trustees have not
24 carried their burden to show why those risk premiums are too
25 low. First, in proposing their alternative risk premiums their

1 experts have focused on market data, again, which includes a
2 profit element.

3 In addition, they have not, as discussed above,
4 effectively challenged the debtors' projections or valuations.
5 They have pointed out the debtors' own disclosure of the risk
6 that they may lose some senior management upon confirmation of
7 the plan, although I assume that this risk was taken into
8 account in the debtors' projections and is, with all respect to
9 Mr. Carter and the other senior management team at the
10 financial level, less likely to occur for truly senior
11 management at the operational level, who might be harder to
12 replace.

13 In addition, it appears that both Messrs. Augustine
14 and Kearns have slanted their analysis in ways that undercut
15 their opinions. Mr. Augustine has not provided any analysis
16 about collateral coverage for the replacement notes or total
17 enterprise value. He also added extra interest into his
18 projections, in essence double counting, to set a gross debt
19 leverage amount that would then justify the extra interest. He
20 also appears to have picked the very high end of leverage and
21 rate factors when stating that the market has, in the last two
22 months, materially changed, while these factors have since
23 adjusted downward (at least as of the confirmation hearing),
24 and has ignored the fact that the reorganized debtors' leverage
25 continually goes down under the debtors' projections, including

1 under the twenty percent per year down-side projection scenario
2 that Mr. Derrough ran, instead taking, in effect, a one-time
3 leverage snapshot at its peak.

4 Mr. Kearns, although not taking as many liberties as
5 Mr. Augustine, only focused on collateral leverage while
6 ignoring the \$600 million equity investment and total debt
7 leverage.

8 Both experts for the first and 1.5 lien trustees also
9 referred to rates of default for notes on a market basis that
10 are rated, as they believe the replacement notes would be
11 rated, at B2B or B and referred to defaults of, in Mr. Kearns'
12 case, 34 percent in respect of such securities. They did not
13 analyze, however, the difference between default and recovery
14 rates. Clearly, the risk of default is an important risk to
15 consider in this type of analysis, but the more important risk
16 is the ultimate risk of non-payment (for example,
17 notwithstanding the debtors' bankruptcy, there is sufficient
18 committed backup takeout financing to pay the first and 1.5
19 lien holders' allowed claims in full in cash), which is where
20 collateral coverage and total debt leverage come into play and
21 support the debtors' analysis.

22 The experts for the first and 1.5 lien trustees have
23 also complained about the duration of the notes, although the
24 first lien replacement note's seven-year term is, in essence,
25 the remaining term of the present first lien notes, and the

1 risk differential attributable to the 1.5 lien replacement
2 notes' seven-and-a-half year maturity in Mr. Kearns' chart is
3 de minimis.

4 I also believe that once one takes out fees such as
5 pre-payment fees and other costs and similar covenants, the
6 covenants in the replacement notes for the first and the 1.5
7 lien holders are not materially different on an economic basis
8 from the covenants in the proposed backup takeout facilities.

9 Consequently, applying a formula of prime plus 1 to 3
10 percent, as I believe is appropriate under Till and Valenti
11 unless there are extreme risks that I believe do not exist
12 here, a risk premium of 1.5 and 2 percent, respectively, for
13 the two series of replacement notes is appropriate.

14 There is one point, however, on which I disagree with
15 the debtors' analysis. The debtors, consistent with Valenti,
16 105 F.3d at 64, and the well-reasoned Village at Camp Bowie
17 case, 454 B.R. at 712-15, chose as their base rate the
18 applicable or imputed Treasury note rate. It was appropriate
19 for them to do this, rather than blindly following the prime
20 rate used in Till. The Treasury note rate actually is, as both
21 Mr. Kearns and Mr. Derrough testified, often used as a base
22 rate for longer-term corporate debt such as the replacement
23 notes. The prime rate may, on the other hand, be a more
24 appropriate base rate for consumers, although Valenti chose the
25 Treasury rate, instead, perhaps because such loans are

1 considered to be essentially riskless. Both rates of course
2 are easily determinable. But the Treasury rate, as confirmed
3 by all three experts, does not include any risk, given that the
4 United States government is the obligor, whereas an element of
5 risk is inherent in the prime rate, which strongly correlates
6 to the interest rate banks charge each other on overnight
7 interbank loans and thus may reflect risks seen in banks'
8 financial strength, of stronger concern during the last few
9 years.

10 Given that fact, I question whether the 1 to 3 percent
11 risk premium spread over prime used in Till would be the same
12 if instead, as here, a base rate equal to the Treasury were
13 used. I say this in particular under the present circumstances
14 where the prime rate for short-term loans is materially higher
15 than the Treasury rate for long-term loans, a somewhat
16 anomalous result. It seems to me, then, that although the
17 general risk factor analysis conducted by Mr. Derrough was
18 appropriate, there should be an additional amount added to the
19 risk premium in light of the fact that the debtors used
20 Treasury rates as the base rate. The additional increment, I
21 believe, should be another .5 percent for the first lien
22 replacement notes, and an additional .75 percent for the 1.5
23 lien replacement notes. I believe that these adjustments
24 adequately take into account risks inherent in the debtors'
25 performance of the replacement notes above the essentially

1 risk-free Treasury note base rates. Therefore, rather than
2 being the seven-year Treasury plus 1.5 percent, equaling 3.6 as
3 of August 26, 2014, the rate for the first lien replacement
4 notes should be the Treasury rate plus 2 percent, for an
5 overall rate of 4.1 percent as of such date; and the rate for
6 the 1.5 lien replacement notes should be the imputed seven-and-
7 a-half-year Treasury note rate plus 2.75 percent, or a 4.85
8 rate as of August 26, 2014. This would require an amendment to
9 the plan, obviously, and I don't know whether the necessary
10 parties would agree to it, but I believe that they should,
11 because it is necessary to cram down the plan over the
12 objection of the first and 1.5 lien holder classes.

13

14 That leaves one remaining issue, which is the
15 confirmability of the plan in light of the plan's third-party
16 release and injunction provisions. Those provisions have not
17 been objected to except for the first and 1.5 lien trustees'
18 objection to the inclusion of third-party releases for parties
19 named or identified in state court lawsuits brought by the
20 first and 1.5 lien trustees to enforce the terms of the
21 Intercreditor Agreement on the second lien holders. (Those
22 lawsuits have been removed to this Court, although remand
23 motions are pending.) The second lien holder third parties
24 covered by the plan's release and injunction provisions are
25 referred to here as the "Released Second Lienholders").

1 While it is true that third-party releases and related
2 injunctions in Chapter 11 plans and confirmation orders are,
3 under the law of the Second Circuit, proper only in rare
4 cases, see *Deutsche Bank AG v. Metromedia Fiber Network, Inc.*,
5 416 F.3d 136, 141 (2d Cir. 2005), if they are consensual or are
6 not objected to after proper notice, courts generally approve
7 them unless they are truly overreaching on their face. I do
8 not find anything truly offensive in these releases and, thus,
9 to the extent that they have not been objected to or a party
10 voted in favor of the plan or did not opt out notwithstanding
11 the clear notice in the ballot that stated, in upper-case
12 letters, "If you voted to reject the plan and you did not opt
13 out of the release provisions by checking the box below, or if
14 you voted to accept the plan regardless of whether you checked
15 the box below, you will be deemed to have conclusively,
16 absolutely, unconditionally, irrevocably and forever released
17 and discharged the Released Parties from any and all claims and
18 causes of action to the extent provided in Section 12.5 of the
19 plan," the plan may be confirmed consistent with both
20 Metromedia and the case law interpreting it, as summarized by
21 Judge Lane in *In re Genco Shipping & Trading, Ltd.*, 513 B.R.
22 233 (Bankr. S.D.N.Y. 2014).

23 It is another story, however, where there is a
24 substantial objection to a third-party release and related
25 injunction, which is the case here, albeit that it is by a

1 group that at least under the ruling that I just gave, would be
2 satisfied as a matter of law by a plan that would be consistent
3 with my cramdown ruling (which is one of the factors arguing
4 for a release's effectiveness under the caselaw that I have
5 cited).

6 Here, what was originally sought to be released
7 included claims made by the first and 1.5 lien trustees against
8 the Released Second Lienholders in the litigation that has been
9 removed to this Court. In that litigation, the first and 1.5
10 lien trustees assert a breach claim under the Intercreditor
11 Agreement based on the Released Second Lienholders' support of
12 the plan and receipt of consideration under the plan before the
13 payment to the holders of the first and 1.5 liens required by
14 the Intercreditor Agreement, which, they contend, under the
15 agreement's definition of "discharge of indebtedness," is
16 payment in full, in cash.

17 In light of comments made during the confirmation
18 hearing regarding my concerns about the proposed release as it
19 applied to the Released Second Lienholders, the debtors and
20 those released parties have agreed, however, to amend the plan
21 to carve out of the release of rights with respect to, and the
22 discharge of, the pending litigation, provided that the Court
23 maintains jurisdiction over that litigation.

24 I conclude, having evaluated the factors under
25 Metromedia and the case law supporting third-party plan

1 releases -- and, though not fully, having reviewed the
2 litigation claims against the Released Second Lienholders --
3 that this modified release is appropriate and would be
4 sustained if the plan were otherwise confirmable.

5 It is is clearly the case that the Released Second
6 Lienholders are providing substantial consideration under the
7 plan. They are agreeing not to seek pari passu treatment on
8 their deficiency claims with the trade creditors (that is, all
9 creditors with unsecured claims with the exception of the
10 senior subordinated unsecured noteholders), who are being paid
11 in full under the plan.

12 They are also committing to underwrite the \$600
13 million equity investment under the plan. They have also
14 supported confirmation of the plan starting with executing a
15 prepetition plan support agreement (although I agree with Judge
16 Lane's conclusion in Genco Shipping & Trading that one cannot
17 bootstrap a plan support agreement containing an
18 indemnification right into consideration for a third-party
19 release under a plan).

20 I also believe that the third-party release is an
21 important feature of this plan. Counsel for the indenture
22 trustees, in essence, asked me to play a game of chicken with
23 the Released Second Lienholders (beyond my comments that led to
24 the on-the-record amendment of the release) to see if they
25 actually would withdraw their support of the plan if the plan

1 and confirmation order were not reasonably satisfactory to
2 them, by requiring the full deletion of the release, but I'm
3 not prepared to do that. I believe that, instead, I can assess
4 the likelihood that the Released Second Lienholders would walk
5 as well as Mr. Carter on behalf of the debtors did, and assume,
6 like Mr. Carter, that there is a reasonable risk that if this
7 release, as modified on the record, did not remain in the plan,
8 the Released Second Lienholders would withdraw their support of
9 the plan. This reasonable risk is especially significant,
10 moreover, given all that the Released Second Lienholders have
11 committed to do under the plan.

12 Nevertheless, I think that the released parties'
13 substantial consideration should be weighed against, in some
14 measure, the claims that are being asked to be released and,
15 where they're being actively pursued, as is the case with the
16 carved-out litigation, ensure that such claims are not
17 frivolous or back-door attempts to collect from the reorganized
18 debtors notwithstanding the discharge. Thus, I believe that it
19 is appropriate to maintain jurisdiction over such litigation,
20 as provided in the modified release, for the same reasons that
21 Judge Gerber has discussed in a number of opinions, including
22 In re BearingPoint, Inc., 453 B.R. 486 (Bankr. S.D.N.Y. 2011),
23 and In re Motors Liquidation Company, 447 B.R. 198 (Bankr.
24 S.D.N.Y. 2011): that, in order to be able to sort out whether a
25 suit is, in large measure, a strike suit or looking to get a

1 recovery from the reorganized debtor through the artifice of
2 proceeding against a third party or, on the other hand, sets
3 forth a genuine claim that would not be covered by the
4 bankruptcy plan or for which there's not sufficient value being
5 provided by the released parties, the court should, at a
6 minimum, keep jurisdiction over the matter. This also avoids
7 the potential for conflicting orders in different courts and
8 the assertion in other courts of positions notwithstanding the
9 doctrines of collateral estoppel and res judicata, which, based
10 on oral argument, I have serious concerns over here. And I do
11 not believe that the Released Second Lienholders or other
12 courts should be subjected to a potentially multi-court process
13 with respect to the pending Intercreditor Agreement litigation
14 and enforcement of this Court's confirmation order.

15 I also should note, because this was raised in the
16 objection, that I firmly believe that I have jurisdiction over
17 this issue for the reasons that I stated at the beginning of
18 this ruling, and that I can issue a final order on it within
19 the confines of *Stern v. Marshall*, given that this is in the
20 context of the confirmation of the plan, and pertains
21 ultimately to the debtors' rights under the Bankruptcy Code.
22 That would hold true, even post-confirmation or with regard to
23 a post-confirmation effect on the estate. See, for example, *In*
24 *re Quigley Company*, 676 F.3d 45, 53 (2d Cir. 2012), cert.
25 denied, 133 C. Ct. 2849 (2013); *In re Chateaugay Corp.*, 213

1 B.R. 633, 637-38 (S.D.N.Y. 1997), and In re Lombard-Wall, Inc.,
2 44 B.R. 928, 935 (Bankr. S.D.N.Y. 1984).

3 So, were the plan to be amended as I have said I would
4 find to be appropriate with regard to the cramdown interest
5 rates, I would confirm the plan as it otherwise stands,
6 including the amended release provision.

7 I believe that covers all of the outstanding
8 confirmation issues. As I said before, to the extent that
9 these issues also overlap with issues that have been raised in
10 the three adversary proceedings covered by the confirmation
11 procedures order, those issues have been decided at this time
12 as well; therefore, I need an order in those proceedings,
13 regardless of what you do with amending the plan.

14 Dated: White Plains, New York
15 September 9, 2014

16 /s/ Robert D. Drain
17 United States Bankruptcy Judge
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